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Introduction

"The assets of private [pension] plans, estimated to be in excess of $130 billion, constitute the only large private accumulation of funds which have escaped the imprimatur of effective federal regulation."[1]

In 1974, Congress passed and President Gerald Ford signed into law the Employee Retirement Income Security Act ("ERISA").[2] Federal regulation finally placed its imprimatur on American corporate pension funds.[3] Today, the assets of corporate and public sector pension funds approach $5 trillion.[4] Besides ERISA, various provisions of the Internal Revenue Code ("IRC")[5] and the Age Discrimination in Employment Act ("ADEA")[6] regulate pension plans. Together ERISA, the IRC and the ADEA have prevented many of the abuses that plagued the private pension system prior to 1974.[7]

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1. S. REP. NO. 92-1150, at 3-4 (1972) (discussing the Retirement Income Security for Employees Act of 1972).

2. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. & 29 U.S.C.).

3. The signing, on Labor Day, Sept. 2, 1974, took place almost ten years after the release of PUBLIC POLICY AND PRIVATE PENSION PROGRAM: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS BY THE PRESIDENT'S COMMITTEE ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS (1964), and more than seven years after the introduction of the first pension reform bill that the report prompted. *See* DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 34 n.3 (7th ed. 1996).

4. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FLOW OF FUNDS ACCOUNTS: FLOWS AND OUTSTANDINGS, FIRST QUARTER 2000, at 111 (2000).

5. I.R.C. §§ 72, 401-404, 412, 501 (1994).

6. 29 U.S.C. §§ 621-634 (1994).

7. Although federal law regulated pensions via the tax code prior to 1974, protections for individuals were not the focus of the regulation. *See infra* note 81.

Today, a new design of pension plans endangers the hard-won protections that pension beneficiaries enjoy.[8] In 1996, the IRS first recognized what it referred to as a "pension plan that defines benefits for each employee by reference to the amount of the employee's hypothetical account balance."[9] The plan design, a hybrid of defined benefit and defined contribution pension plan types, is more popularly known as a cash-balance pension plan.[10] Because of their structure, cash-balance plans have the potential to devalue older employees' current benefits as well as reduce their future benefit accruals until retirement. Recently, IBM Corporation's plan conversion raised the ire of older employees, prompting talk of unionization drives at some plants.[11] IBM's conversion plan also drew criticism from the media and government officials.[12] Despite the negative reaction, employers continue to convert their plans to combat rising benefit costs and to cater to the typical worker of increasingly short tenure.[13]

This Article will argue that cash-balance pension plans circumvent the protections intended to be provided by existing laws. Part I outlines traditional employer-sponsored pension plans and the ways in which cash-balance plans alter the basic framework. Part II examines the three major legislative provisions, ERISA, the IRC and the ADEA, and how they address the discrimination issues that cash-balance plans raise. Part III uses this legal background to critically evaluate the adequacy of existing legal provisions to address the aspects of potential inequality in cash-balance plans. Conversions to cash-balance plans enable employers to evade the policies of ERISA, the IRC

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protections for individuals were not the focus of the regulation. *See infra* note 81. Similarly, it was not until 1990 that the ADEA, despite being first passed in 1967, explicitly protected pension beneficiaries from age discrimination. *See infra* notes 139-140, 147-148 and accompanying text.

8. *See supra* note 3 and accompanying text.

9. I.R.S. Notice 96-8, 1996-1 C.B. 359.

10. *See* Douglas Tokerud, *New on the Pension Scene: The Cash-Balance Plan*, COMP. & BEN. REV., Jan.-Feb. 1986, at 33, 33; *see also infra* note 26 (discussing the difference between defined benefit and defined contribution pensions). Because this Article primarily appraises cash-balance plans, the term "pension" is used throughout to refer to defined benefit plans.

11. *See* Diane E. Lewis, *Change in Pension Plan Stirs Union Talk at Big Blue*, BOSTON GLOBE, July 25, 1999, at G1.

12. *See* Richard A. Oppel, Jr., *Companies Cash in on New Pension Plan, But Older Workers Can Face Penalties*, N.Y. TIMES, Aug. 20, 1999, at C1. Rep. Bernie Sanders of Vermont maintains an Internet site devoted entirely to the controversy surrounding IBM's plan conversion. *See* Rep. Bernie Sanders, *IBM Cash Balance Pension Plan*, at http://bernie.house.gov/pensions (last visited September 13, 2000).

13. *See* Fran Hawthorne, *Why Designer Pensions Are in Fashion*, INSTITUTIONAL INVESTOR, June 1, 1992, at 123, 124.

and the ADEA because most of the provisions of the three are inadequate in the context of cash-balance plans. The cash-balance plan is a pension innovation that reduces employer benefit costs, but does so at the expense of older workers.

I. Pensions—Then and Now

A. A Brief History of Pensions

Employer-sponsored pensions are a relatively recent innovation in corporate employment in the United States.[14] Though the first plans appeared in the last quarter of the nineteenth century, the most significant growth in the number of plans has occurred since World War II.[15] Since then, pensions have become an essential source of retirement income for Americans.[16] Notwithstanding retirees' reliance on Social Security benefits, personal savings and part-time employment, employer-sponsored pension plans are a major source of retirement income.[17] The tremendous size of pension funds underscores their central place in the employer-employee relationship.[18]

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14. *See* MCGILL, *supra* note 3, at 20. In 1875, American Express was the first to sponsor a large-scale industrial pension plan. *See* TERESA GHILARDUCCI, LABOR'S CAPITAL: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS 14 (1992). In 1912 Montgomery Ward created the first comprehensive plan, including life and disability insurance. *See id.* Montgomery Ward's early sponsorship is noteworthy, as today it is one of many employers seeking to convert to a cash-balance plan. *See infra* note 73.

15. *See* GHILARDUCCI, *supra* note 14, at 75. The "welfare capitalism" movement of the 1920s, which sought to inhibit union organizing and reduce turnover, was a driver of pension plan growth. *See id.* at 14. Efforts to circumvent World War II wage controls through deferring pay as pensions also played a role in the rise of employer-sponsored retirement benefits. *See id.* at 36. The War Labor Board's 15% cap on wage increases as a means of reigning in inflation did not include employer contributions to pension funds in calculating violations. *See id.*

16. Though compensation is most often thought of in terms of an hourly wage or annual salary, the importance of pension benefits to the value of total compensation cannot be overestimated. In 1996, all employee benefits combined constituted almost 41% of total payroll for the average company, with retirement benefits making up over 6%. *See* U.S. CHAMBER OF COMMERCE, EMPLOYEE BENEFITS: THE HIDDEN PAYROLL: A STUDY OF BENEFITS PRACTICES AND COSTS OF A CROSS-SECTION OF AMERICAN FIRMS 13 (1997).

17. The combination of Social Security, personal savings and private pensions is often referred to as the "three-legged stool" of American retirement policy. *See* KAREN FERGUSON & KATE BLACKWELL, PENSIONS IN CRISIS 6 (1995); *see also* Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 857 (1987) (discussing the "tripartite system" of national retirement security policy).

18. Pension funds are often regarded as the largest accumulation of private capital in the country. *See* FERGUSON & BLACKWELL, *supra* note 17, at 137. Pension funds represent a large portion of national savings. Stanford University

Employers sponsor pension plans for a variety of reasons. Tax benefits are one major motivation. If pension benefits are viewed as a deferred wage,[19] contributions to a pension plan give employers a significant tax advantage because contributions to the fund are a tax deductible business expense and investment returns on the fund are not taxable.[20] In the past, commentators considered employer benevolence at least partially responsible for pension sponsorship.[21] More commonly, however, pension plan sponsorship results from the employer's need to both attract and retain talented, loyal employees,[22] and encourage older, less productive employees to retire.[23] Finally, employers have

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economist John B. Shoven estimates that fund contributions accounted for all of national savings during the 1980s and accounted for more than 17% of national wealth by 1990. *See* JOHN B. SHOVEN, RETURN ON INVESTMENT: PENSIONS ARE HOW AMERICA SAVES 26, 29 (1991). Pension funds are a major force in the stock market with more than two-fifths of the funds' money invested in corporate equity. *See id.* Thus, pension funds own more than a quarter of corporate America. *See id.* Pension fund dominance in U.S. securities markets has arisen largely since 1950, with funds holding less than 1% of corporate equity and less than 15% of corporate bonds prior to 1950. *See* RICHARD A. IPPOLITO, PENSIONS, ECONOMICS, AND PUBLIC POLICY 4 (1986). Pension fund control of capital, however, faces criticism on a number of fronts. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. & ECON. 305, 308 (1976) (discussing agency costs associated with separating ownership, as represented by the pension fund, and control, as represented by the managers of the companies in whose shares the fund invests); Mark J. Roe, *The Modern Corporation and Private Pensions*, 41 UCLA L. REV. 75, 84 (1993) (citing CEOs' reluctance to compel pension fund activism as contributing to general shareholder passivity).

19. *See* GHILARDUCCI, *supra* note 14, at 2-3; *see also* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 278-79 (6th ed. 1997) (arguing that increased pension costs resulting from regulation will reduce cash wages in competitive labor markets).

20. *See* PAUL P. HARBRECHT, PENSION FUNDS AND ECONOMIC POWER 8-9 (1959); MCGILL, *supra* note 3, at 24-25; *see also infra* notes 111-113 and accompanying text (discussing the IRC's treatment of pension fund contributions and investment returns). Tax advantages accrue not only to the employer but also to the employee. Pension savings are not taxable to the employee until payment is made, thus avoiding the "double taxation" of taxable wages and taxable interest income on savings. *See* IPPOLITO, *supra* note 18, at 7.

21. *See* NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., INDUSTRIAL PENSIONS IN THE UNITED STATES 24 (1925).

22. *See* MERTON C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 11 (1964); MCGILL, *supra* note 3, at 24; NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 21, at 25-26.

23. *See* BERNSTEIN, *supra* note 22, at 10; GHILARDUCCI, *supra* note 14, at 9 (intoning that pensions are for workers who are "too old to work, too young to die"); NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 21, at 28. One court referred to "an industrial old age . . . an economic human obsolescence, entirely distinct from the evening of life." Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 879-80 (Ohio Ct. App. 1937). The court held that the plaintiff was entitled to a pension, though only age fifty-two, because he had served the company for more

sometimes sponsored plans in an effort to stave off drives for unionization.[24] While pensions provide important benefits to employees, employers also have self-regarding incentives to sponsor plans.[25]

B. *Calculating Benefits*

Most defined benefit pension plans pay benefits based on a formula that includes a figure for average pay over an employee's tenure and years of service.[26] The benefit is typically composed of a percentage of pre-retirement compensation that accrues for each

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than twenty-seven years, and was engaged in an occupation in which "mature youth would be at a premium" and that the plaintiff "had reached a point where a younger man would serve [his employer] much more satisfactorily." *Id.* at 878-80. Faced with an aging workforce and labor shortages, however, today's employers are increasingly seeking ways to retain their older workers. *See* Arie Halachmi, *Dealing with Employees over Fifty: Reflections and an Introduction*, 22 PUB. PRODUCTIVITY & MGMT. REV. 6, 7-9 (1998); Charlene Marmer Solomon, *Unlock the Potential of Older Workers*, PERSONNEL J., Oct. 1995, at 56, 56. There is at least some evidence that traditional stereotypes about older workers are waning. *See* Barbara L. Hassell & Pamela L. Perrewe, *An Examination of Beliefs About Older Workers: Do Stereotypes Still Exist?*, 16 J. ORG. BEHAV. 457, 457 (1995).

24. *See* BERNSTEIN, *supra* note 22, at 11. Indeed, pressure from unions already representing workplaces is credited with pushing employers to sponsor plans. *See* MCGILL, *supra* note 3, at 25. Research shows that, on average, union members are more likely to be covered by an employer-sponsored pension plan than non-union members. *See* IPPOLITO, *supra* note 18, at 189.

25. Regardless of their reasons for sponsoring pension plans, most employers communicate frustration at navigating the intense and disjointed maze of pension regulations. *See* Linda Thornburg, *The Pension Headache*, HRMAG., Jan. 1992, at 39, 39; *see also infra* Part II (discussing the pension regulations of ERISA, the IRC and the ADEA).

26. *See* IPPOLITO, *supra* note 18, at 191. Pension plans are divided into two broad categories: defined benefit and defined contribution. Defined benefit plans pay a specific benefit that is calculated according to a formula that includes pay and years of service. *See* FERGUSON & BLACKWELL, *supra* note 17, at 16-17. Employers who sponsor defined benefit plans bear the responsibility of contributing to a pension fund and managing its investments in such a way that all promised benefits can be paid out of the fund. *See id.* In defined contribution plans, employers contribute a specified amount to employees' accounts and employees bear the responsibility of managing the funds in such a way as to maximize their return. *See id.* A popular variety of defined contribution pension is the 401(k) plan, which takes its name from the IRC section that enables its creation. *See id.*; I.R.C. § 401(k) (1994).

While cash-balance plans exhibit qualities of both defined benefit and defined contribution pensions and are sometimes referred to as "hybrid" plans, they are wholly defined benefit plans in nature. *See* Lindsay Wyatt, *'Hybrid' Plans for Evolving Workforce*, PENSION MGMT., Mar. 1996, at 12, 12; I.R.S. Notice 96-8, 1996-1 C.B. 359; *see also* MCGILL, *supra* note 3, at 297 (noting that hybrid plans are typically "repackaging of one plan type so that it looks like the other"). Other hybrid plans include pension equity and floor plans. *See* MCGILL, *supra* note 3, at 302-05 (discussing the mechanics of such plans).

year of credited service.[27] For example, a plan might pay an employee 1% of his average pay over his career for each year of service.[28] More commonly, average pay is based on the final five or ten years of service, so as to most closely approximate the pay in the years closest to retirement.[29] This benefit amount is then paid out as a lifetime monthly annuity.[30] In order to receive payments, plan participants must be vested, meaning that they must fulfill a minimum number of years of service before receiving benefits.[31] In place of the annuity, some plans allow beneficiaries to receive a lump-sum payment at retirement.[32] Similarly, some plans allow workers who end their employment before retirement age to take a lump-sum payment based on the present value of their expected lump-sum benefit at retirement.[33]

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27. *See* MCGILL, *supra* note 3, at 27. The plan sponsor will define the percentage that accrues based on the percentage of pre-retirement income that the sponsor seeks to replace during retirement. *See id.*

28. *See id.* at 203-04. The nature of a defined benefit plan means that employers contribute to and invest the pension fund such that these benefits can be paid when they come due. *See id.* at 27. While some plans may pay a flat dollar amount per year of service, more than two-thirds of plan participants in a recent survey were covered by plans that use earnings-based formulas. *See* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1991, at 79 (1993).

29. *See* MCGILL, *supra* note 3, at 204. For example, in a 2% final average pay ("FAP") plan, an employee with thirty years of service and a FAP of $60,000 will receive a pension benefit that is 2% of $60,000 multiplied by thirty years of service. This yields a lifetime annuity of $36,000, or $3000 per month, and replaces roughly 60% of pre-retirement income.

30. *See id.* at 213. An annuity is a stream of periodic payments. *See* GERHARD G. MUELLER & LAUREN KELLY, INTRODUCTORY FINANCIAL ACCOUNTING 21 (3d ed. 1991).

31. *See* MCGILL, *supra* note 3, at 107. Vesting is usually five years, meaning that employees who leave before reaching five years of service forfeit their pension benefits. *See id.* Some plans allow partial vesting, whereby a participant earns a right to a percentage of her pension, perhaps 20% per year, until fully vested. *See id.*

32. *See id.* at 223. The lump-sum is the "actuarial present value" of the retirement benefit, where actuarial value is defined as "the benefit amount (1) multiplied by the probability on which the benefit payment is conditioned [which in most cases is the survival of the pension beneficiary] and (2) discounted at a stipulated rate . . . of interest." *Id.* at 503. Probability, in this case, is equivalent to life expectancy, which is quantified using compilations of death rates at stated ages called mortality tables. *See id.* at 506.

Similarly, some plans may allow for early retirement benefits commencing before the normal retirement age of sixty or sixty-five. These benefits are also actuarially reduced such that early retirees receive a payment whose present value is equivalent to that of the benefit they would have received at the normal retirement age. *See id.* at 215; *see also* Edward P. Lazear, *Pensions as Severance Pay*, *in* FINANCIAL ASPECTS OF THE U.S. PENSION SYSTEM 57 (John Shoven et al. eds., 1983) (examining early retirement benefits that exceed the present value of future benefits).

33. *See* MCGILL, *supra* note 3, at 215. The concept of present value assumes

Regardless of whether a lump-sum option is available, the prevalence of final average pay plans[34] demonstrates the importance of pension beneficiaries' earnings late in their careers.[35] This is consistent with retaining loyal and productive employees for long terms of service.[36] Increasingly, however, the emphasis on final average pay is giving way to a new model.

C. *A Changing Workforce, a Changing Model*

Today, the traditional model of employer-sponsored defined benefit pensions is somewhat of an endangered species among the various types of retirement plans. Changes in the economy and the workforce have altered the format of plans that employers find meet their dual goals of minimizing costs and attracting desired employees.[37] While traditional defined benefit plans still exist, the number in existence has been static for many years.[38] In addition to relying more on defined contribution plans,[39] many employers are moving away from the traditional model and toward the cash-balance model.[40]

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that a stated amount of money payable in the future is equivalent to some smaller amount payable today, making the lump sum payable at early retirement a lesser amount than that payable at retirement. *See* MUELLER & KELLY, *supra* note 30, at 20.

34. Most defined benefit pension plans are of the FAP variety. *See supra* note 28, at 79.

35. *See supra* note 29 and accompanying text.

36. *See supra* note 22 and accompanying text.

37. *See infra* notes 43, 68-71 and accompanying text.

38. The Bureau of Labor Statistics reports a gradual decline in the number of employees covered by defined benefit pension plans since 1980. *See* U.S. DEPT. OF LABOR, *supra* note 28, at 79. Indeed, the fact that many plans still exist, despite zero growth, is chiefly attributable to the tremendous regulatory hurdles plan sponsors must navigate to terminate a plan and liquidate its funds. *See infra* note 89 (discussing ERISA's plan termination provisions).

39. Employers report that the defined contribution plan, mostly of the 401(k) variety, is the most popular type of retirement plan. *See* U.S. CHAMBER OF COMMERCE, *supra* note 16, at 28.

40. *See* Hawthorne, *supra* note 13, at 123. Estimates of employers choosing to convert to cash-balance plans range from 300 to 900. *See id.* (citing 300); Christine Williamson, *Up, Up and Away: Cash Balance Catches Fire*, PENS. & INV., May 31, 1999, at 20, 20 (citing 900). The trend has been widespread, involving more than twenty of the Fortune 100 companies, and affects unionized employers and those in the public sector. *See Birmingham Mulls Cash Balance Plan*, PENS. & INV., Nov. 16, 1998, at 37, 37; Ricki Fulman, *AT&T Unions Move to Cash Balance Plan*, PENS. & INV., June 15, 1998, at 4, 4; Terry Williams, *Hybrid Pension Plans Dominate Public Sector: Separate Trend Favors More DC Plans*, PENS. & INV., Sept. 6, 1999, at 24, 24; *IBM Announces Plan Conversion, Offers Transitional Benefits to Employees*, PENS. & BEN. DAILY (BNA), at D4 (May 7, 1999), *available at* Westlaw, 5/7/1999 PBD d4.

Unlike the traditional model, cash-balance plans define their benefits not in terms of a retirement annuity, but rather as a lump-sum amount.[41] Cash-balance plans make a "contribution" to the employees' account on a regular basis,[42] and the account balance grows at a stated rate of interest.[43] The account, however, is simply a record-keeping device.[44] A plan sponsor still pays for benefits out of one pension fund, but the account mechanism is used to show employees how their pensions grow while they are working.[45] If an employee has met the vesting requirements when she ends her employment, the balance of the account is hers to take with her.[46] Thus, instead of averaging pay in the later, more lucrative years of employment as most traditional defined benefit pensions do,[47] cash-balance plans require employees to accrue a flat percentage of pay annually over their careers.[48]

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41. *See* MCGILL, *supra* note 3, at 297.

42. *See Plan Administration: Hybrid Pension Plans Compared to Traditional Defined Benefit Plans*, PENS. & BEN. DAILY (BNA), at D3 (June 22, 1995), *available at* Westlaw, 6/22/95 PBD d3 [hereinafter *Plan Administration*]. In the former, growth is a reflection of actual earnings whereas in the latter, growth is simply a product of the plan formula. *See* MCGILL, *supra* note 3, at 297; *see also supra* note 26 (discussing the differences between defined contribution and defined benefit).

43. For example, a typical plan might pay 4% of an employee's annual salary and credit the account with interest tied to some benchmark interest rate, such as that on thirty-year Treasury Bonds. *See Plans Draw Both Praise, Criticism*, PENS. & BEN. DAILY (BNA), at D9 (Mar. 5, 1999), *available at* Westlaw, 3/5/1999 PBD d9. Note that the 4% of salary is not a contribution that the employee makes but rather, the amount by which the account balance, exclusive of compounded interest, grows annually. The fixed percentage of pay, in contrast to the traditional model's emphasis on final average pay, results in lower average benefits and therefore lowered costs for employers. *See supra* note 29 and accompanying text; Hawthorne, *supra* note 13, at 123. In "frontloaded" plans, interest is credited to the account until the benefit is paid, regardless of whether the beneficiary remains employed with the plan sponsor. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359, 359-60. In "backloaded" plans, interest accrual ends when employment ends. *See id.* at 360-61.

44. *See* MCGILL, *supra* note 3, at 297; *Plan Administration*, *supra* note 42, at D3.

45. *See Plan Administration*, *supra* note 42, at D3. In theory, the sum of the hypothetical accounts should equal the assets of the fund. *See Plans Draw Both Praise, Criticism*, *supra* note 43, at D9.

46. *See Plans Draw Both Praise, Criticism*, *supra* note 43, at D9. Unlike the methods for calculating a lump-sum payment discussed above, *see supra* notes 32-33, the lump-sum value may or may not be equal to the account balance. In frontloaded plans, the lump-sum payment is the present value of the hypothetical account balance calculated with interest credits up to the normal retirement age. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359, 360-61. In backloaded plans, the balance is equivalent to the lump-sum payment. *See id.*

47. *See supra* notes 29, 34 and accompanying text.

48. *See* MCGILL, *supra* note 3, at 297.

The two tables below[49] illustrate the differences in benefit accrual between cash-balance and traditional FAP plans. In Table 1,[50] the figures for the average present value of cash-balance and FAP benefits illustrate the differences in accrual patterns discussed above.[51] While younger workers, those below age fifty-five, accrue more under the cash-balance plan, those over age fifty-five accrue significantly more under the traditional FAP plan. This disparity is most evident in the percentage of final average pay that the expected pension benefit represents. For all ages through age fifty-five, the cash-balance benefit replaces a larger percentage of final average pay than does the FAP benefit. Beyond age fifty-five, however, the FAP benefit replaces more.

Because plan benefits also vary based on years of service,[52] Table 2[53] summarizes expected benefits for various service amounts both at ages before and after retirement.[54] For all workers in the group eligible for retirement at termination, the FAP benefit exceeds the cash-balance benefit. The value of the benefit as a percentage of final average pay is also higher in this category. The opposite is true for those terminating before retirement. For this group, the cash-balance benefit exceeds the FAP benefit both in dollars and as a percentage of final average pay.

49. Carol Quick, *Overview of Cash Balance Plans*, 8 ACA J. 24, 24-25 (Fourth Quarter 1999).

50. *See id.* at 24. The figures are based on a study of 250,000 pension plan participants between 1989 and 1995. *See id.* at 25. The second and third columns represent the present value of expected future benefits. For a discussion of the concept of present value, see *supra* note 33.

51. *See supra* notes 26-36, 41-48 and accompanying text.

52. *See supra* notes 26, 43 and accompanying text.

53. *See* Quick, *supra* note 49, at 24-25.

54. The figures presented represent averages for the various levels of service both for "retirees," those over age fifty-five, and "terminations," those whose employment ends at age fifty-five or younger, presumably before eligibility for a pension benefit. *See* Quick, *supra* note 49, at 24-25.

Table 1: Comparison of Present Value of Benefits in Cash-balance and Final Average Pay Plans

	AVERAGE PRESENT VALUE OF:			PRESENT VALUE AS A PERCENTAGE OF FINAL PAY:	
AGE	CASH-BALANCE BENEFIT	FAP BENEFIT	FINAL AVERAGE PAY	CASH-BALANCE BENEFIT	FAP BENEFIT
<26	$ 4,568	$464	$19,644	23.3%	2.4%
26-30	8,490	1,151	29,379	28.9	3.9
31-35	13,169	2,399	35,406	37.2	6.8
36-40	19,046	4,785	38,271	49.8	12.5
41-45	26,563	9,129	39,879	66.6	22.9
46-50	34,206	16,140	41,311	82.8	39.1
51-55	45,925	41,176	41,272	111.3	99.8
56-60	55,200	83,272	40,334	136.7	206.5
61-65	55,831	89,302	37,963	147.1	235.2
>65	55,622	78,382	37,313	149.1	212.7

Table 2: Comparison of Present Value of Benefits in Cash-balance and Final Average Pay Plans for Terminations and Retirees

	AVERAGE PRESENT VALUE OF:			PRESENT VALUE AS A PERCENTAGE OF FINAL PAY:	
SERVICE	CASH-BALANCE BENEFIT	FAP BENEFIT	FINAL AVG. PAY	CASH-BALANCE BENEFIT	FAP BENEFIT
retirees (age 56 and older)					
5-10	$11,322	$ 23,063	$36,187	31.3%	63.7%
11-15	21,237	40,571	35,322	60.1	114.9
16-20	32,291	58,102	36,563	88.3	158.9
21-25	44,379	74,828	36,710	120.9	203.8
>25	85,870	124,338	41,727	205.8	298.0
terminations (age 55 and younger)					
5-10	10,319	3,141	34,718	29.7	9.0
11-15	25,379	8,032	37,832	67.1	21.2
16-20	34,710	15,090	39,644	87.6	38.1
21-25	49,736	25,974	41,600	119.6	62.4
>25	72,916	53,456	44,241	164.8	120.8

D. *Making the Change*

Because most employers deciding to offer cash-balance plans already maintain traditional defined benefit plans,[55] establishing the new plan requires converting the existing plan benefits to the new plan.[56] The two major issues in conversion are calculating starting balances for current employees and whether to allow some employees to remain in the old plan.[57] Both issues relate to the treatment of participants in the old plan and implicate the major differences between traditional defined benefit pensions and cash-balance plans.[58]

First, cash-balance plan sponsors must decide how to establish an opening account balance for participants in the existing traditional plan.[59] Most often, the new plans will use the present value of the accrued pension benefit under the existing plan as the opening balance in the new plan.[60] Alternatively, employers may calculate balances as though the cash-balance plan had always been in effect.[61] In such a case, older employees whose benefits under the old plan exceed those under the new plan will retain their accrued benefit under the old plan as the opening account balance.[62] A key feature of this option is the "wear-away" provision. For an employee whose accrued benefit becomes the opening account balance, the new plan need not credit the account until the benefits under the new plan exceed, or "wear-away" those under the old.[63]

Plan sponsors also face the issue of transitional benefits, or whom to allow to remain in the old plan under "grandfather" provisions.[64] Because older employees will accrue less under the new plan,[65] setting the cutoff age for transitional benefits too high has the potential to reduce benefits for those beyond the age and

55. *See* MCGILL, *supra* note 3, at 301.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*; Hawthorne, *supra* note 13, at 127; *see also supra* note 33 (discussing the concept of present value).

61. *See* MCGILL, *supra* note 3, at 301.

62. *See Lawmakers Ask IRS to Stop Issuing Determination Letters for Cash Balance*, PENS. & BEN. DAILY (BNA), at D4 (July 16, 1999), *available at* Westlaw, 7/16/1999 PBD d4.

63. *See id.*; I.R.S. News Release IR-99-9 (Oct. 19, 1999), *available at* 1999 WL 956732; *infra* note 130 and accompanying text (discussing legal basis for "wear-away" provisions).

64. *See* MCGILL, *supra* note 3, at 301.

65. *See supra* note 43.

tenure where cash-balance is less lucrative than traditional pensions.[66] Commonly, those within five years of retirement may retain benefits under the old plan.[67]

Despite the issues that transitions raise, several factors have spurred employer interest in establishing cash-balance plans. Cash-balance plans are more attractive to younger workers than traditional defined benefit plans. The new plan design also allows employers to reduce aggregate pension expenditures. Because the plans pay younger workers the same benefit—a percentage of salary—as older workers, the plans allow short-tenure employees to quickly accrue valuable benefits.[68] The lump-sum payment feature common to most cash-balance plans also enhances their "portability."[69] This feature is particularly important to employers with a mobile and global workforce.[70] The change in the benefit formula also enables employers to reduce their benefit costs.[71] The existence of the fictional account makes it easier for employers to communicate the plan provisions and personalized benefit calculations to their employees.[72] Finally, increased merger and acquisition activity has made cash-balance plans a popular means of restructuring workforces.[73]

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66. *See* Hawthorne, *supra* note 13, at 124.

67. *See* MCGILL, *supra* note 3, at 301. Realizing that some employees will always lose no matter where the age cutoff is placed, Honeywell, Inc. gave all employees the choice of which plan to participate in after its recent move to a cash-balance plan. *See* Michael R. Bonsignore & Brent Bowers, *Of 'Me' and 'We' Moments*, N.Y. TIMES, Oct. 27, 1999, at C12.

68. *See* Hawthorne, *supra* note 13, at 124. Hawthorne points out that the plans have also benefited the increasing numbers of part-time workers in the labor force. *See id.*

69. *See* Susan Barreto, *A Common Plan: BP Intends to Lead Amoco to the Cash Balance Altar*, PENS. & INV., Aug. 23, 1999, at 1, 1. "Portability" refers to employees' ability to transfer their pension benefits when changing jobs. *See id.*

70. *See* Kevin Dent, *Benefit Provision for Internationally Mobile Employees*, BEN. & COMP. INT'L, June 1, 1998, at 15, 15-16; Simon Wasserman, *Cash Balance: An International Perspective*, 30 COMP. & BEN. REV., Nov./Dec. 1998, at 29, 29. The World Bank recently replaced its traditional defined benefit plan with a cash-balance plan for its multinational employees. *See* Vinetta Anand, *World Bank Changes Plan: Employees Get Investment Choice, Sponsor Gains Arbitrage*, PENS. & INV., Apr. 20, 1998, at 2, 2. The plans are equally attractive to labor-intensive employers and those with high rates of employee turnover such as banks, universities and hospitals. *See* FERGUSON & BLACKWELL, *supra* note 17, at 68.

71. *See* Hawthorne, *supra* note 13, at 123; *see also supra* note 43 (discussing cost savings associated with cash-balance plans).

72. *See* Williamson, *supra* note 40, at 20.

73. *See* Harold W. Burlingame & Michael J. Gulotta, *Case Study: Cash Balance Pension Plan Facilitates Restructuring the Workforce at AT&T*, 30 COMP. & BEN. REV., Nov./Dec. 1998, at 25, 25; *Wards to Cash Balance*, PENS. & INV., July 12, 1999, at 1, 1. According to one estimate, mergers and acquisitions rose from 3,385 in 1983 to 9,124 in 1995, changing in value from $96.2 billion to $453.3 billion. *See*

Together, these factors have made converting to a cash-balance pension plan a strategic business decision for many employers. Such a strategic decision, however, is not made in a regulatory vacuum. Multiple forms of federal legislation regulate the contours of employer-sponsored pensions.

II. The Legal Landscape

Three distinct but overlapping legislative provisions regulate pension plans. Various aspects of pension mismanagement contributed to the passage of each law. A discussion of the current regulatory state of pension plans lays the groundwork for the legal labyrinth through which cash-balance plans must maneuver.

A. *ERISA*

In the first half of the twentieth century, the growth of pension coverage, the increase in financial influence wielded by pension funds, and innovations in plan design brought the need for legislative oversight and judicial interpretation of pension plan provisions.[74] Disputes between unions and employers as to whether pension plan provisions were a mandatory subject for bargaining led to early judicial recognition of the importance of pensions.[75] Such recognition, however, would not prevent ongoing abuses in the private pension system.

1. The Need for Pension Reform

In spite of the advantages that employers saw in offering pension plans to their employees,[76] they did not always uphold the promises they made to provide future benefits.[77] The failure to

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THE 1997 INFORMATION PLEASE BUSINESS ALMANAC 237 (1996). Notable among these, cash-balance plans played a role in the Amoco-British Petroleum merger, *see* Barreto, *supra* note 69, at 1, the NationsBank-BankAmerica merger, *see* Vineeta Anand, *Bank Plan Blurs Line Between DB, DC*, PENS. & INV., Sept. 21, 1998, at 1, 1, the Compaq-Digital merger, *see* Barry B. Burr, *DEC, Compaq Fund Issues Complicated*, PENS. & INV., Feb. 23, 1998, at 3, 3, and the Allied Signal-Honeywell merger, *see* Bonsignore & Bowers, *supra* note 67, at C12.

74. *See supra* notes 14-25 and accompanying text.

75. *See, e.g.*, Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1949) (upholding the NLRB's decision that pensions were a condition of employment in the meaning of the National Labor Relations Act despite arguments that pensions are not adaptable to bargaining). In its own opinion, the NLRB casually mentioned but did not examine the fact that the plan required retirement of all employees by age sixty-five. *See In re* Inland Steel Co., 77 N.L.R.B. 1 (1948); *see also infra* note 138 and accompanying text (discussing the impact of the ADEA on mandatory retirement).

76. *See supra* notes 22-25 and accompanying text.

77. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 638 (1994).

pay promised benefits was due to national economic trends[78] and employer malfeasance.[79] These abuses prompted increased attention to pension practices, then legislative action to remedy the problems.[80]

ERISA's legislative history demonstrates the role of such abuses in motivating the law's passage and courts' treatment of it since enactment reinforces this legislative intention.[81] Establishing minimum and reliable standards for plan vesting requirements and insuring plans against unfunded liabilities were both central to the design of ERISA's provisions.[82] The statute

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78. The Great Depression caused many plans to fail in the 1930s, leaving employees without the benefits they expected. *See id.* at 637. Into the 1960s, plan sponsors continued to fund their plans inadequately, which meant that plan assets were not always sufficient to pay promised benefits. *See id.* at 638. An anemic stock market in the 1960s and 1970s also coincided with an increase in pension terminations. *See* GHILARDUCCI, *supra* note 14, at 102; *see also supra* note 18 (discussing pension fund dominance of the U.S. stock market).

79. *See* GHILARDUCCI, *supra* note 14, at 145. Employers often terminated healthy plans at will, leaving current and future pension recipients with little explanation as to why their benefits were terminated. *See id.* Most notably, in 1963, the Studebaker Company closed its plant in South Bend, Ind., laying off 7000 men and women. *See* FERGUSON & BLACKWELL, *supra* note 17, at 3; *see also* Leigh Allyson Wolfe, *Is Your Pension Safe? A Call for Reform of the Pension Benefit Guaranty Corporation and Protection of Pension Benefits*, 24 SW. U. L. REV. 145, 145-81 (1994) (discussing the impact of the Studebaker plan termination). The closure resulted in the termination of not only promised pension benefits for current employees, but also the end to benefits already being paid to retirees. *See* GHILARDUCCI, *supra* note 14, at 133. Ironically, Studebaker's pension plan booklet promised employees the ability to "settle down on a farm [or] visit the country or just take it easy . . . and know that you'll still be getting a regular monthly pension paid for entirely by the company." FERGUSON & BLACKWELL, *supra* note 17, at 3 (internal quotations omitted). The Pension Restoration Act of 1991, an amendment to the Older Americans Act Reauthorization, would have paid benefits to those whose pensions were lost due to pre-ERISA abuses, most of whom were former Studebaker employees. *See* GHILARDUCCI, *supra* note 14, at 182 n.1 (1992). The bill was thought too expensive and never passed. *See id.*

80. *See* GHILARDUCCI, *supra* note 14, at x; *see also supra* note 3 (discussing the decades-long effort to pass ERISA).

81. *See* MCGILL, *supra* note 3, at 31-34. Prior to ERISA, federal regulation of private pensions consisted mainly of limited provisions of the IRC, the Labor Management Relations (Taft-Hartley) Act, Pub. L. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 26 U.S.C. (1994)), and the Welfare and Pensions Disclosure Act, Pub. L. 5-836, 72 Stat. 997 (1958) (repealed 1974). Before 1974, however, none of these Acts had as its focus the protection of individual plan participants. *See infra* note 85 (discussing court decisions interpreting ERISA).

82. *See* H.R. REP. NO. 93-533, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640. The Report states that Congress designed ERISA to:

> establish equitable standards of plan administration; mandate minimum standards of plan design with respect to vesting of plan benefits; require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities; insure the vested portion of unfunded liabilities against the risk of premature plan termination; and promote a renewed expansion of private retirement plans and increase the number of

itself warns that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans."[83] The statute goes on to warn of inadequate protections for such employees and their beneficiaries:

> owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries... that minimum standards be provided assuring the equitable character of such plans and their financial soundness.[84]

Since ERISA's passage, multiple Supreme Court opinions have cited ERISA's declaration of policy to invoke the need to protect employees from benefit plan abuses.[85]

Passed under Congress' interstate commerce,[86] taxation[87] and postal[88] authorities, ERISA covers not just employer-sponsored

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participants receiving private retirement benefits.

Id. Some economic theorists suggest that regulation has in fact inhibited expansion of private retirement plans. *See* EHRENBERG & SMITH, *supra* note 19, at 278-79.

83. 29 U.S.C. § 1001(a) (1994).

84. *Id.* Optimistic after its passage, Senator Jacob Javits of New York, the law's primary sponsor, sounded a common sentiment, remarking that "the agony of years of frustrated and disappointed beneficiaries has now come to an end. The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security." *Quoted in* Francis X. Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984).

85. *See, e.g.*, Massachusetts v. Morash, 490 U.S. 107, 113 (1989) (stating that ERISA was passed "to safeguard employees from the abuse and mismanagement" of pension funds); Shaw v. Delta Airlines, 463 U.S. 85, 90 (1983) (stating that ERISA is "designed to promote the interests of employees and their beneficiaries in employee benefit plans"); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 15 (1987) (stating that Congress enacted ERISA to provide safeguards "with respect to the establishment, operation, and administration of [employee benefit] plans."); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) (stating one purpose of ERISA is to ensure workers receive their promised benefits); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361-62 (1980) (stating that ERISA was based on congressional findings that "the continued well-being and security of millions of employees and their dependents are directly affected by these [benefit] plans.") (internal quotations omitted).

86. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* 29 U.S.C. § 1001(a) (noting that plans utilize "instrumentalities of interstate commerce").

87. *See* U.S. CONST. art. I, § 8, cl. 1; *see also* 29 U.S.C. § 1001(a) (noting that plans "substantially affect the revenues of the United States because they are afforded preferential... tax treatment").

88. *See* U.S. CONST. art. I, § 8, cl. 7; *see also* 29 U.S.C. § 1001(a) (noting that plans are "carried on by means of the mails").

pensions but all benefit plans that employers, unions or both sponsor.[89] Thus, the law encompasses health and disability insurance plans as well as all varieties of profit-sharing plans, including pensions.[90] Central to the law's pension provisions are requirements for disclosure, reporting and establishment of standards for plan fiduciaries.[91] Further, it requires vesting of accrued benefits after significant service and sets minimum standards for plan funding.[92] Finally, ERISA's broad preemption of state law accentuates these sweeping provisions.[93]

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89. *See* 29 U.S.C. § 1003 (1994). The law is divided into four titles. Title I covers definitions, scope, administrative requirements, remedies and penalties. *See* 29 U.S.C. §§ 1001-1169 (1994). Title II is subsumed in the IRC. *See* I.R.C. §§ 401-409 (1994). Title III divides authority for implementation and administration between the Departments of Labor and Treasury. *See* 29 U.S.C. §§ 1201-1242 (1994). Finally, Title IV addresses plan termination and establishes the Pension Benefit Guaranty Corporation, an insurance mechanism for under-funded pension plans. *See* 29 U.S.C. §§ 1301-1461 (1994); *see also* Dana M. Muir, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits*, 87 MICH. L. REV. 1034, 1035 (1989) (examining whether early retirement benefits are among those that must be satisfied before terminating a plan); Wolfe, *supra* note 79, at 145 (critiquing the PBGC's protection of early retirement benefits).

Congress has liberally amended ERISA since 1974. The Multi-employer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified as amended in scattered sections of 29 U.S.C.), added provisions for multi-employer plans. The Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, 96 Stat. 324 (1982) (codified as amended in scattered sections of 29 U.S.C.), imposed special rules on plans which pay a high proportion of benefits to officers and executives. The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of 29 U.S.C.), addressed issues of gender equity in pension benefits. The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986) (codified as amended in scattered sections of 29 U.S.C.), added provisions requiring employers to allow terminated employees to continue health insurance coverage. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 29 U.S.C.), made several amendments including accelerating the time period during which pension benefits must become vested. The Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986) (codified as amended in scattered sections of 29 U.S.C.), amended benefit accrual guidelines. The Single-Employer Pension Plan Amendments of 1986, Pub. L. No. 99-272, 100 Stat. 237 (1986) (codified as amended in scattered sections of 29 U.S.C.), revamped the system of insurance for terminated plans.

90. *See* 29 U.S.C. § 1003.

91. *See* 29 U.S.C. § 1001(b); *see also* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107-60 (1988) (outlining unintended and detrimental effects of ERISA's fiduciary duty requirement).

92. *See* 29 U.S.C. § 1001(c).

93. *See* 29 U.S.C. § 1144(a) (1994). ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.*; *see also* Shaw v. Delta Airlines, 463 U.S. 85, 108 (1983) (holding that ERISA preempts New York's Human Rights Law insofar as the state law prohibited practices lawful under federal law). State workers' compensation and disability and unemployment insurance laws are, however, generally exempted from preemption. *See* 29 U.S.C. §

2. Accrued Benefits and Accrual Rates Under ERISA

ERISA's protection of accrued benefits prevents the abuses that previously left employees without promised benefits.[94] Accrued benefits are those "determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age."[95] Plan participants have a non-forfeitable right to accrued benefits.[96] Thus, employers may not reduce accrued benefits nor enact plan amendments that reduce accrued benefits.[97]

ERISA also sets a floor for rates of benefit accrual, prohibiting a plan from providing a reduced rate of accrual based on a participant's age.[98] Further, the law establishes a minimum rate at which benefits must accrue.[99] Such a requirement addresses the pre-ERISA practice of crediting employees with benefits only in their final years of service, which prevented many from ever qualifying for a pension.[100]

Despite prohibiting reductions in accrued benefits and mandating minimum rates of benefit accrual, ERISA does not contains a per se prohibition of reducing rates of future benefit accrual. Instead, the statute mandates that plan sponsors provide employees notice of any significant reduction in future accruals that accompany plan amendments.[101] The notice does not need to provide specific information to participants, but may simply summarize the effects of the amendment on all plan participants.[102]

1003(b)(3) (1994).

94. *See supra* note 79.

95. 29 U.S.C. § 1002(23)(A) (1994).

96. *See* 29 U.S.C. § 1053(a) (1994).

97. *See* 29 U.S.C. § 1054(g) (1994).

98. *See* 29 U.S.C. § 1054(b)(1)(H) (1994).

99. *See* 29 U.S.C. § 1054(b)(1) (1994). The statute provides for three different rates at which an employee's expected retirement benefit must accrue during each year of employment. *See id.*

100. *See* FERGUSON & BLACKWELL, *supra* note 17, at 4.

101. *See* 29 U.S.C. § 1054(h)(1) (1994). The statute reads that a plan may not be amended:

> so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to . . . each participant in the plan . . . .

Id.

102. *See* Treas. Reg. § 1.411(d)-6 (1996). The regulations require that "the summary need not explain how the alternate benefit of each participant . . . will be affected by the amendment." *Id.* The notice, however, must be written in such a way as to be "understood by the average plan participant." *Id.*

3. ERISA and Age Discrimination

ERISA's age discrimination provisions are limited in their scope. The law prescribes guidelines for minimum participation, and requires that employers refrain from excluding employees from a plan beyond the later of age twenty-one or the completion of one year of service.[103] Further, ERISA prohibits the exclusion of otherwise eligible participants from a plan based on age.[104] Finally, ERISA establishes a normal retirement age at which employers must pay benefits out.[105]

B. IRC

Before ERISA, the law regulated pension plans largely via tax policy under the IRC.[106] Today, ERISA and the IRC overlap in many of the protections that they provide.[107] The IRC differs from ERISA and the ADEA because compliance with its pension plan provisisions is essentially optional.[108] Because of the tax advantages associated with compliance, however, most employers

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103. *See* 29 U.S.C. § 1052(a)(1)(A) (1994).

104. *See* 29 U.S.C. § 1052(a)(2) (1994).

105. *See* 29 U.S.C. § 1056(a) (1994). The law requires that benefits be paid:

> not later than the 60th day after the latest of the close of the plan year in which—
>
> (1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,
>
> (2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or
>
> (3) the participant terminates his service with the employer.

Id. Thus, while employers may pay benefits earlier, they may not delay payment beyond the later of ten years of service or age sixty-five for terminated employees.

106. *See supra* note 7.

107. These include vesting, minimum funding, and accrual guidelines. *See* MCGILL, *supra* note 3, at 44.

108. *See id.*; *see also* Hollingshead v. Parmer, 747 F. Supp. 1421, 1434 (M.D. Ala. 1990) (noting that ERISA does not compel compliance with IRC for purposes of receiving tax advantages but adding that "tax consequences of not qualifying are so severe that practical considerations generally force employers to qualify their plans"). Using the tax code as a pension policy tool does not come without criticism. *See generally* Richard J. Kovach, *A Critique of SIMPLE—Yet Another Tax-Favored Retirement Plan*, 32 NEW ENG. L. REV. 401 (1998) (faulting a recent pension innovation for small employers while continuing to constrain individual choice in retirement security); Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275 (1991) (linking paternalistic pension policy, in the form of favorable tax treatment, to the inconsistency between age and individuals' savings preferences); Graetz, *supra* note 17 (evaluating the efficacy of retirement security linked to tax policy); Richard G. Schreitmueller, *Get the IRS out of Pension Plan Regulation*, PENS. & INV., Mar. 9, 1998, at 14 (arguing that the IRS's chief goal of revenue collection is inconsistent with seeking effective pension plan operation).

opt to abide by the IRC provisions.[109] In fact, the pension fund deduction that employers receive is the largest net tax outflow in the federal budget.[110]

1. General Provisions for Qualified Plans

Pension funds that meet the IRC's requirements for "qualification,"[111] enjoy a tax deduction for contributions to the plan.[112] They also generally receive tax-exempt status for the plan's assets.[113] Among the requirements for qualification are that the funds for payment of pension benefits be held in trust[114] and that the funds be used for the exclusive benefit of plan participants.[115] Further, the IRC defines minimum employee participation standards[116] and requires that plans not discriminate in favor of highly-compensated employees.[117] The IRC also requires that the plan sponsors offer certain annuity options to married participants[118] and that annual payments from qualified plans not exceed certain limits.[119]

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109. *See* MCGILL, *supra* note 3, at 31-34. State tax laws often impose requirements on pension sponsors that are similar to those of the federal tax code, *see id.*, though this Article only addresses the federal tax code.

110. *See* OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001, at 109-11 (2000). The deduction for the 2000 fiscal year was estimated at $88 billion, far exceeding the next highest, the deduction for employer-sponsored health insurance, at $75 billion. *See id.*

111. *See* I.R.C. § 401(a) (1994). A pension fund, or "trust," is referred to as a "qualified trust" if certain requirements are met. *See id.* Such funds are commonly referred to as "qualified plans." Section 404 limits deductibility generally to those contributions made by an employer necessary to meet the fund's minimum funding standards. *See* I.R.C. § 404(a) (1994); *see also* I.R.C. § 412(a) (1994) (establishing minimum funding standards); *supra* note 26 (discussing employers' obligation to fund defined benefit plans to meet future pension obligations).

112. *See* I.R.C. § 404(a) (1994).

113. *See* I.R.C. § 501(a) (1994). Exceptions to such an exemption are for-profit organizations where all profits are payable to a non-profit entity, *see* I.R.C. § 502(a) (1994), and, more relevant to pension trusts, entities that participate in prohibited transactions, *see* I.R.C. § 503(a). Generally, a prohibited transaction is a preferential loan, compensation arrangement, or sale made to the pension plan sponsor or a party with a financial, familial, or ownership connection to the sponsor. *See* I.R.C. § 503(b)(1)-(6).

114. *See* I.R.C. § 401(a)(1) (1994).

115. *See* I.R.C. § 401(a)(2) (1994). This is analogous to ERISA's fiduciary duty requirement. *See supra* note 91 and accompanying text.

116. *See* I.R.C. § 410 (1994). The standards are identical to ERISA's minimum age requirements for participation. *See supra* notes 103-105 and accompanying text.

117. *See* I.R.C. §§ 401(a)(4), 404(a)(2), 414(q) (1994).

118. *See* I.R.C. § 401(a)(11) (1994).

119. *See* I.R.C. § 415 (1994).

2. Accrued Benefits and Accrual Rates Under the IRC

The IRC's accrual guidelines are identical to those of ERISA.[120] The Code mandates specific minimum rates at which benefits must accrue.[121] Further, accruals may not be ceased based on a participant's age.[122] Finally, those benefits that have already accrued to a participant may not be reduced.[123]

3. Cash-Balance Plans and the IRC

While neither ERISA nor the ADEA specifically addresses cash-balance plans,[124] the IRS has recognized the plans' existence.[125] Despite this recognition, specific guidance has been minimal.[126] IRS regulations do provide some guidance on benefit accrual rates in cash-balance plans.[127] Garnering the most attention from the IRS, however, has been the degree to which cash-balance plans frontload their benefit accruals.[128] Consistent with the accrual guidelines applied to traditional pension plans,

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120. *See supra* note 99.

121. *See* I.R.C. § 411(b) (1994).

122. *See* I.R.C. § 411(b)(1)(H) (1994).

123. *See* I.R.C. § 411(d)(6) (1994).

124. ERISA's sweeping inclusion of all employee benefit plans limits its specificity with respect to particular plan types. *See supra* note 90 and accompanying text. The ADEA provisions on age discrimination in employee benefits are broad and do not address specific plan types. *See infra* notes 138-153 and accompanying text.

125. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359.

126. *See Benefits Attorney Urges IRS Rules to Clarify Age Discrimination Issues in Conversions*, PENS. & BEN. DAILY (BNA), at D-3 (Aug. 12, 1999), *available at* Westlaw 8/12/1999 PBD d3. The IRS recently solicited comments from employees, employers, and their representatives on issues related to cash-balance plans. *See* I.R.S. News Release IR-99-97 (Oct. 19, 1999), *available at* 1999 WL 956732.

127. *See* Treas. Reg. § 1.401(a)(4)-8(c)(3) (1991); *see also supra* notes 121-122 and accompanying text (discussing accrual rates in general under the IRC). Sections 411(a) and 417(e) have been applied to the calculation of lump-sum distributions from cash-balance plans. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359.

128. *See* Memorandum from C. Ashley Bullard, District Director, IRS, to Director, Employee Plans Division, IRS (Sept. 3, 1999), *at* http://www.house.gov/bernie/legislation/ibm/letter_memo.html (last visited September 15, 1999) [hereinafter Memorandum from C. Ashley Bullard] (addressing a cash-balance plan that includes a declining benefit accrual rate). Though the identity of the plan sponsor was omitted when the memo was made public, reports indicate that it is Onan Corp., a subsidiary of Cummins Engine Corp. *See* Colleen T. Congel, *Firm's Conversion Disqualifies Plan; Court Should Lift Exempt Status, IRS Says*, PENS. & BEN. DAILY (BNA), at D-2 (Aug. 30, 1999), *available at* Westlaw, 8/30/1999 PBD d2. The IRS's case is *Seidlitz v. Commissioner of Internal Revenue*, No. 334-99R (T.C. filed Aug. 13, 1999). Participants in the plan have also filed a suit alleging that the conversion to a cash-balance plan violated both ERISA and the ADEA. *See* Eaton v. Onan Corp., No. IP97-814-CH/G (S.D. Ind. filed May 19, 1997), http://www.insd.uscourts.gov/caseinfo.htm.

the IRS has thus far interpreted a plan that reduces accrual rates with age as failing to meet the qualification requirements.[129]

Recent testimony before Congress indicates that the IRS is taking an increasingly cautious approach to cash-balance plan conversions.[130] Currently, all proposed conversions must be forwarded to the IRS's national office for a technical review.[131] Requiring the IRS's field offices to forward such matters is considered the equivalent of a moratorium on plan conversions, at least for the time being.[132]

C. *The ADEA*

Enacted in 1967, the Age Discrimination in Employment Act ("ADEA"), as its name implies, was intended to prevent discrimination in the workplace based on age.[133] Despite a healthy economy prior to the law's passage, older workers found themselves displaced from their jobs because of their age, and had difficulty finding new work because of arbitrary age limits imposed by employers.[134] The statute prohibits age-based discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment."[135] Notwithstanding the decades-old ruling in *Inland Steel Co. v. NLRB*[136] that pensions were conditions of employment and therefore subject to bargaining,[137] broad protection of employee benefit plans for older workers by the ADEA was not automatic.

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129. *See* Memorandum from C. Ashley Bullard, *supra* note 128, at 8.

130. *See Hybrid Pension Plans: Hearing Before the Senate Comm. on Health, Educ., Labor & Pensions*, 106th Cong., 15-27 (2000) (statement of Stuart L. Brown, Chief Counsel, IRS) [hereinafter *Hybrid Pension Hearings*]. Brown explained that, under the IRC, new cash-balance plans need not credit a participant with benefits until the present value of his or her benefit under the new plan catches up to, or "wears away," the present value of any benefit accrued under the old plan. *See id.* at 16. This is entirely consistent with the protection of accrued benefits under both ERISA and the IRC. *See supra* notes 94-97 and 120-123; *see also supra* note 63 and accompanying text (discussing the financial aspects of the "wear-away").

131. *See Hybrid Pension Hearings*, at 16.

132. *See* Jack L. VanDerhei, *The Controversy of Traditional vs. Cash Balance Pension Plans*, ACA J., Fourth Quarter 1999 no. 4, at 7, 14.

133. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602 (1967).

134. *See id.* § 2(a).

135. 29 U.S.C. § 623(a)(1) (1994).

136. 170 F.2d 247 (7th Cir.1949).

137. *See supra* note 75 and accompanying text (explaining the court's holding and the position of the NLRB).

1. Initial Claims of Age Discrimination in Employee Benefits

The ADEA addresses discrimination in employee benefits with respect to both age of retirement and benefits related to age. Its prohibition of a mandatory retirement age, restricted by a few limited exceptions, is clear.[138] The provisions prohibiting limitations on benefits related to age, however, have evolved over the last twenty years. The original text of the ADEA specifically exempted most employee benefit plans from inclusion in the ADEA's protections.[139] Subsequent amendments modified the ADEA to prevent involuntary retirement.[140] With regard to identifying discrimination, the Equal Employment Opportunity Commission (EEOC) adopted an equal cost justification for varying benefits based on age.[141] In *Public Employees Retirement System v. Betts*,[142] the Supreme Court rejected this interpretation. The Court relied on the plain language of the statute[143] and its interpretation of "subterfuge" in *United Air Lines v. McMann*,[144]

138. *See* 29 U.S.C. § 623(a) (1994). Section 623(f) allows use of age only as a "bona fide occupational qualification." U.S.C. § 623(f)(1); *see also* Western Airlines v. Criswell, 472 U.S. 400, 417 (1985) (holding that age is a bona fide occupational qualification where it is a legitimate proxy for appropriate job qualifications in that it is impossible or highly impractical to deal with older employees on an individualized basis); Trans World Airlines v. Thurston, 469 U.S. 111, 122 (1985) (holding that age-based discrimination must relate to a "particular business" to qualify for bona fide occupational qualification defense).

139. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602 (1967) (exempting benefit plans so long as they were not "a subterfuge to evade the purposes of . . . [the] Act").

140. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978), amended the ADEA to prohibit plans from requiring or permitting "the involuntary retirement of any individual." 29 U.S.C. 623(f)(2)(A) (1994); *see also* 29 C.F.R. § 1625.10(7) (1999) (defining involuntary retirement provisions as "a subterfuge to evade the purpose of the Act"). These amendments overruled the decision in *United Air Lines v. McMann*, 434 U.S. 192 (1977), in which the Court interpreted "subterfuge" to mean "a scheme, plan, stratagem, or artifice of evasion." *Id.* at 203. The court reasoned that the plan provision in question, mandatory retirement at age sixty, was in effect prior to the passage of the ADEA and thus could not be intended to evade the purposes of the law. *See id.*

141. *See* 29 C.F.R. § 1625.10(d) (1988) (stating that "a plan . . . which prescribes lower benefits for older employees on account of age is not a 'subterfuge' . . . provided that the lower level of benefits is justified by age-related cost considerations").

142. 492 U.S. 158 (1989) (involving a public pension plan that paid disability retirement benefits to employees disabled before age 60, a difference of $159 per month).

143. *See id.* at 175.

144. 434 U.S. 192; *see also supra* note 140 (discussing the definition of subterfuge in *McMann*).

holding that the ADEA regulated only hiring and firing and was not intended to regulate employee benefits.[145] Thus, employers could continue to vary benefits based on age absent any subjective intent to discriminate.[146]

In 1990, in response to *Betts,* Congress passed the Older Workers Benefit Protection Act.[147] The legislation codified the EEOC's previous "equal cost" or "equal benefit" approach to discrimination in benefits.[148] Accordingly, the regulations now provide for the use of "valid and reasonable" cost data to justify providing older employees with lower benefits.[149] Judicial interpretation of this cost justification is limited to relatively clear cases where benefits are denied instead of simply reduced.[150] Thus, the 1990 amendments re-established the equal cost justification, but guidance on its meaning has been limited.

2. Disparate Impact Under the ADEA

As a threshold issue, it is unlikely that the ADEA even supports disparate impact claims of discrimination.[151] Both age

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145. *See Betts,* 492 U.S. at 177-78 (citing *McMann).*

146. *See Betts,* 492 U.S. at 181. Violations of the ADEA are considered willful where the employer either "knew or showed reckless disregard . . . [as to] whether its conduct was prohibited by the ADEA." Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (quoting Air Line Pilolt's Ass'n, Int'l v. Trans World Airlines, 713 F.2d 940, 956); *see also* Robinson v. County of Fresno, 882 F.2d 444, 446 (9th Cir. 1989) (holding that plan sponsor's concession that age-based benefit reductions were not motivated by economic reasons did not demonstrate intent to discriminate).

147. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990).

148. *See* 29 U.S.C. § 623(f)(2)(B)(i) (1999) (providing that it is not unlawful for employers to vary benefits based on age where "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker").

149. *See* 29 C.F.R. § 1625.10(d)(1) (1999) (providing for use of a "benefit-by-benefit" approach to evaluating cost in retirement plans). The provisions, however, address only denial of participation and not actual benefits. *See* § 1625.10(f)(1)(B)(iii).

150. *See* AARP v. Farmers Group, Inc., 943 F.2d 996, 1001-05 (9th Cir. 1991) (finding a violation of the ADEA where a sponsor provides no non-discriminatory reason for denying benefits and was thus violative of the ADEA). Further, it held that the sponsor had "made the entire benefits package as undesirable as possible for persons over age 65." *Id.* at 1004.

151. The text of the statute supports this interpretation by allowing an employer to differentiate among employees "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1994); *see also* Mullin v. Raytheon Co., 164 F.3d 696, 703-04 (1st Cir. 1999) (holding that "the ADEA does not impose liability under a theory of disparate impact."), *reh'g denied,* 171 F.3d 710 (1st Cir. 1999), *cert. denied,* 68 U.S.L.W. 3222 (U.S. Oct. 4, 1999); Ellis v. United Airlines, 73 F.3d 999, 1009 (10th Cir. 1996) (stating that "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim."); Lyon v. Ohio Educ. Ass'n, Prof'l Staff

and length of service, a factor that is often a function of age, enter into calculating pension benefits.[152] The Supreme Court has held, however, that employer decisions are not necessarily age-based if based on a factor that is distinct from, even if correlated with, age.[153]

D. *Current Proposals for Reform*

The popularity of cash-balance plans and employers' rush to convert existing plans has garnered Congress's attention.[154] In 1999, members of the House of Representatives introduced two legislative proposals aimed at the cash-balance plan issue.[155] Both address the mechanics of plan conversion and the potential losses that older workers face.[156] One version would supplement the existing notice requirements,[157] and would require an illustration of plan participants' benefits under both the existing traditional plan and proposed cash-balance plan.[158] The other resolution goes further and proposes amendments to both ERISA and the IRC to address the "wearing away of an employee's accrued benefit."[159] It would require an election by any employee so affected to either convert to the new plan or to continue to accrue benefits under the

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Union, 53 F.3d 135, 138-39 (6th Cir. 1995) (differentiating discrimination based on age and discrimination based on seniority, pension status and high salary); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994) (finding no violation of the ADEA if an employer's decision is wholly motivated by factors other than age, even if the motivating factors are correlated with age); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-34 (3d Cir. 1995) (expressing opinion that it is "doubtful" that ADEA supports disparate impact action); Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693 (2000) (discussing "chaotic" state of disparate impact under the ADEA).

152. *See supra* notes 26-29, 42.

153. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11 (1993) (holding that establishing a violation of the ADEA requires proof that age "actually motivated . . . [and] actually played a role in that process and had a determinative influence on the outcome."); *see also* Goldman v. First Nat'l. Bank of Boston, 985 F.2d 1113, 1119-20 (1st Cir. 1993) (holding that no inference of age bias could be made merely on the basis of an employer's decision to convert to a cash-balance pension plan).

154. *See supra* note 12 and accompanying text.

155. *See* Pension Right to Know Act, H.R. 1176, 106th Cong. (1999); Older Workers Pension Protection Act of 1999, H.R. 2759, 106th Cong. (1999).

156. *See* H.R. 1176; H.R. 2759; *see also supra* notes 55-67 and accompanying text (discussing the mechanics of plan conversion).

157. *See* H.R 1176 (discussing the current requirements under ERISA for notice regarding significant reductions in accrual rates).

158. *See* H.R. 1176 § 2. The notice would need to project the accrued benefit and its present value as of a date three, five, and ten years from the date of conversion. *See id.*; *see also supra* note 33 (discussing the concept of present value).

159. H.R. 2759, at 1.

old plan provisions.[160] Both proposals have yet to make it out of committee.[161]

III. Cash-Balance Plans Exposed

A. *How Older Workers Lose*

From labor unions to Congress, academics to lawyers, high-profile opinions that employers' moves to convert to cash-balance plans create injustice are not hard to find.[162] Hindering a concise analysis of the issue, however, are the complicated provisions of pension plans,[163] the technical financial aspects of cash-balance conversions[164] and the reticulated nature of the three applicable legislative schemes.[165] Aspects of finance, accounting, and actuarial methodology make a thorough discussion of the cash-balance issue difficult. One may master the intricacies of ERISA, the IRC and the ADEA only to be flummoxed by the results that a specific combination of age, service and earnings history create for an appraisal of one individual's situation in a cash-balance conversion scenario.

1. An Illustrative Hypothetical

To overcome the complexity of pension mechanics, it is helpful to draw on the average figures discussed above,[166] and to create two hypothetical employees. Hypothetical employee one is between the ages of twenty-six and thirty and the other is between the ages of fifty-six and sixty.

According to the average benefit amounts in Table 1, the younger worker's accrued benefit under a cash-balance plan would

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160. *See id.* § 2(a). In the case of the IBM conversion, *see supra* notes 11-12 and accompanying text, the California Public Retirement System ("CALPERS") recently supported such a measure. *See IBM Workers Get Backer in Pension Fight*, N.Y. TIMES, March 28, 2000, at C27. CALPERS, holder of 9.2 million IBM shares, announced plans to vote its shares in favor of a shareholder resolution requiring the company to give all of its employees the choice to remain in the old plan. *See id.* A representative of the pension fund called the withdrawal of "promised benefits . . . not only morally reprehensible . . . [but also] plain bad business." *Id.*

161. Both have been referred to the Committee on Ways and Means and the Committee on Education and the Workforce. The most current legislative history is available on the Internet. *See CIS Congressional Universe*, http://web.lexis-nexis.com/congcomp (last visited Aug. 29, 2000).

162. *See supra* notes 11, 12, 154, 161 and accompanying text.

163. *See supra* Part II.B.

164. *See supra* Part II.D.

165. *See supra* Part II.

166. *See supra* note 49 and accompanying text.

be $8,490 and would represent approximately 23.3% of final average pay.[167] The same worker's benefit under a FAP plan would only be $1,151, representing 3.9% of final average pay.[168] Such a worker would realize an overall reduction in benefits if he or she worked for the same employer and participated in the same plan beyond the age of fifty-five. That is, she could expect overall greater benefits under the FAP plan over the course of an entire career. Until the age of fifty-five, however, the conversion from a traditional plan to a cash-balance plan would allow the younger worker to accrue higher pension benefits in a shorter period of time.

The opposite is true for the older worker. The older worker's benefit under the FAP plan would be $83,272, representing 206.5% of final average pay.[169] Unlike the younger worker, the older worker's FAP benefit would exceed the benefit in a new cash-balance plan, in this case $55,200.[170] Certainly, an employer would not simply reduce the older employee's benefit.[171] However, the difference in accrual patterns after age fifty-five between the two plans demonstrates how older workers lose.[172] It is important to note that the older worker, nearer retirement than the younger worker, would likely not be contemplating a job change. Thus, he would be expecting to retire under the traditional FAP plan. Even though the older worker's accrued benefit would not be reduced, the older worker would not accrue the benefit he was expecting. While the same reduction would apply to younger workers, they would presumably have the intention of changing jobs anyway, and would thus reap the benefits of earlier accruals.[173]

167. *See supra* note 50 and accompanying tabular material.

168. *See supra* note 50 and accompanying tabular material.

169. *See supra* note 50 and accompanying tabular material.

170. *See supra* note 50 and accompanying tabular material.

171. This would run afoul of the accrued benefit protections of ERISA and the IRC. *See supra* notes 94-97, 120-123 and accompanying text. Given the sizeable worth of the pension fund tax deduction, it is very unlikely that an employer would so blatantly subject a plan to disqualification. *See supra* note 108 and accompanying text.

172. *See supra* note 53 and accompanying tabular material. A brief glance at the numbers demonstrates that retirees, those fifty-six and older, accrue more each year under the FAP plan than under the cash-balance plan, while the opposite is true for those age fifty-five and younger. *See supra* note 53 and accompanying tabular material.

173. The "portable" aspects of cash-balance plans and employers' admitted interest in attracting young and mobile workers support this conclusion. *See supra* notes 68-70 and accompanying text.

2. Reduced Future Accruals and the Wear-Away

The move to a cash-balance plan reduces the rate of future pension accruals specifically for older employees. First, most employers state a desire to attract and retain younger workers as at least one motivation for the move to cash-balance plans.[174] If the move represents a cost savings,[175] but pays younger employees higher benefits,[176] it follows that older workers lose. This is the result of a reduction in future accruals. While the traditional FAP model was designed to value long-term service by weighing benefit accruals toward the end of an employee's tenure,[177] the cash-balance model does just the opposite. Thus, while older employees may have expected a certain level of future accrual, the move to cash-balance plans circumvents this expectation.[178] This disappointment may be particularly troublesome for individuals who have made long-term financial plans based on expected future accruals.[179]

Older workers also lose in cash-balance conversions when they accrue benefits in neither the old plan nor the new cash-balance plan. Some employers convert to cash-balance plans by using the present value of participants' accrued benefits as the opening account balance.[180] Where the plan calculates the opening balance as if the cash-balance plan had always existed,[181] older employees may lose. Because cash-balance plans skew accruals to the early part of a career,[182] it follows that older employee's accrued benefits calculated as if the cash-balance plan had always been in effect will likely exceed those accrued under the old plan. When employers convert by assuming that the cash-balance plan had always existed, they can cease accruals for these employees, at least until the point at which the old plan benefit would exceed the new one. Thus, older workers' benefits are frozen while younger workers begin accruing benefits under a new, more lucrative plan.

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174. *See supra* notes 68, 70 and accompanying text.

175. *See supra* note 71 and accompanying text.

176. *See supra* note 68 and accompanying text.

177. *See supra* note 29 and accompanying text.

178. *See supra* notes 50, 53 and accompanying tabular material.

179. For example, employees may vary their contributions to a 401(k) plan or individual retirement account based on the expected benefits from a defined benefit pension.

180. *See supra* note 54 and accompanying text.

181. *See supra* notes 50, 53 and accompanying tablular material (showing the benefit value and final payouts of each plan).

182. *See supra* note 58 and accompanying text.

The mechanics of the wear-away are very apparent in the hypothetical discussed above.[183] For the older worker who is between the ages of fifty-six and sixty, the benefit under the FAP plan exceeded that under the cash-balance plan.[184] While an employer would not reduce the accrued benefit,[185] the employer could cease crediting the employee with pay and service until the value of benefits under the new plan equaled the value of benefits under the old plan. While the average worker between fifty-six and sixty would have expected a retirement benefit at age sixty-five of $78,382,[186] even though the accrued benefit under the old plan would be preserved, the switch to the cash-balance plan would prevent future accruals for a certain period of time. While not reducing older workers' benefits directly, the wear-away effectively freezes them from participating in the new pension plan. And all of this takes place while younger workers enjoy a windfall in pension accruals.[187]

3. Transitional Benefits

The transitional benefits that employers provide can also be insufficient for many plan participants. To be sure, most employers recognize the potential loss that older employees face and seek to ameliorate it by allowing some to remain in the old plan.[188] No matter where this cutoff lies, however, some employees will always lose. For example, the data in Table 1 illustrates that the present value of benefits under a FAP plan begins to exceed benefits under the cash-balance plan for employees between the ages fifty-one and sixty.[189] Because benefits will always be different for individuals of different ages with varying service and salary histories, pinpointing an exact age at which the FAP benefit begins to exceed the cash-balance benefit is impossible. And the complexity of pension calculations prevents most employees from calculating expected benefits under both plans. While employers seek to minimize this loss, it seems antithetical to the vast protections that pension beneficiaries otherwise enjoy to allow any loss where there is an alternative.

183. *See supra* Part III.A.1.
184. *See supra* note 53 and accompanying text.
185. *See supra* notes 94-97, 120, 123 and accompanying text.
186. *See supra* note 50 and accompanying tabular material.
187. *See supra* notes 167-173 and accompanying text.
188. *See supra* notes 55-56 and accompanying text.
189. *See supra* note 50 and accompanying tabular material.

4. Other Concerns

Besides the concerns raised by the unique financial aspects of cash-balance conversions, the changes also bring with them practical concerns. While these do not focus directly on the age disparities discussed above, they certainly do not ameliorate the effects of an already suspect development. Cash-balance plans and the conversion from traditional plans, if not the entire topic of retirement security, are complicated. Despite employers' belief that cash-balance plans increase the ease with which pension benefits are communicated to employees,[190] the issues surrounding conversion likely do just the opposite. Further, the cash-balance scheme's reliance on the fiction of an individual account,[191] though perhaps understood fully by some employees, clouds the topic by injecting artifice. In addition to the potential for communication difficulties, the move to cash-balance plans increases the likelihood that a given employee will have the option to receive a lump-sum pay-out at the termination of his or her employment.[192] While this is beneficial to those individuals savvy enough to invest for the long-term and insure financial security in retirement, it may increase the chances of squandering retirement savings before actual retirement.

Thus, cash-balance plans present issues related both to age disparity and practical difficulties in ensuring retirement security. The laws that govern the arena, however, appear ill-suited to effectively manage the dangers.

B. ERISA Issues

Despite the clarity of its purpose, ERISA provides inadequate protections for workers affected by conversions to cash-balance plans. Employer abuses such as firing employees on the verge of vesting or making capricious plan amendments to deny employees accrued benefits first prompted ERISA's passage. While the move to cash-balance plans is similar to these abuses in that it, in effect, changes the rules in the middle of the game, it is not technically inconsistent with ERISA's guidelines. First, ERISA's explicit age discrimination provisions simply require participation after a certain combination of age and service,[193] and forbid exclusion from participation based on age.[194] Cash-balance plans, while

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190. *See supra* note 72 and accompanying text.
191. *See supra* notes 43-45 and accompanying text.
192. *See supra* note 69 and accompanying text.
193. *See supra* note 94 and accompanying text.
194. *See supra* note 95 and accompanying text.

raising the age-specific issues discussed here, do not completely exclude participants on the basis of age.[195]

Cash-balance plans, and the conversion thereto from traditional plans, also do not violate ERISA's provisions regarding benefit accrual. Because plan participants maintain the benefits they accrued under the old plan, there is no violation of ERISA's protection of accrued benefits. To be sure, cash-balance plans typically reduce future rates of accrual for older employees.[196] However, ERISA does not forbid such reductions. While there is a prohibition of linking accrual rates to age,[197] future rates of accrual can always be reduced provided the plan sponsor provides adequate notice.[198] While it is tempting to infer that conversion to a cash-balance plan does indeed result in accrual reductions based on age, this is simply not the case. As stated earlier, a cash-balance plan credits plan participants with benefits based on service and pay.[199] While service is likely correlated with age, age is not an explicit element of the benefit formula. Thus, while the conversion to a cash-balance plan results in a de facto reduction in accruals for older employees, it does not violate ERISA.

C. *IRC Issues*

Although the IRS has become increasingly critical of cash-balance plans, the protections that the IRC provides are unclear at best and inadequate at worst. The IRC's provisions are deserving of scrutiny because of the sizeable tax benefit that they allow pension plan sponsors to enjoy.[200] But, like ERISA, the IRC only prohibits reductions in accrued benefits and age-based accruals.[201] Again, cash-balance plans do not result in per se reductions in accrued benefits. In addition, any reductions in future accruals are not directly linked to age.

Despite apparent compliance with the IRC, however, cash-balance plans have garnered increased attention from the IRS. There has been some effort to limit excessive frontloading of benefits,[202] a practice that benefits younger workers at the expense

195. ERISA's preemption of all state laws precludes any claims regarding a cash-balance conversion under a breach of contract theory. *See supra* note 93 and accompanying text.

196. *See supra* Part III.A.2.

197. *See supra* note 101 and accompanying text.

198. *See supra* note 104 and accompanying text.

199. *See supra* note 43 and accompanying text.

200. *See supra* notes 109-113 and accompanying text.

201. *See supra* notes 120-123 and accompanying text.

202. *See supra* notes 128-132 and accompanying text.

of older workers. These efforts, and the resulting effective moratorium on conversions,[203] signal the IRS's feeling that the topic at least requires further investigation. Further, it appears that the wear-away scenario discussed above[204] is entirely consistent with the tax code. Because it does not result in reductions in accrued benefits and does not reduce accrual rates on the basis of age, it does not violate the IRC.[205]

D. ADEA Issues

Of the three legislative schemes that the cash-balance issue invokes, the ADEA presents, on its face, the best prospect for relief. The ADEA's provisions focus on age, and, unlike ERISA and the IRC, are unclouded by the financial and actuarial complexities of benefit accruals. Unfortunately, judicial treatment of the ADEA in the context of a cash-balance conversion prevents such an application.

The "equal cost or equal benefit" justification for age-based disparity in employee benefits makes showing a conversion to a cash-balance plan violative of the ADEA quite difficult. Employers do not attempt to disguise the fact that conversions to cash-balance plans are in part motivated by cost savings.[206] Further, employers change benefits for all employees and do not deny some benefits based on age.[207] Thus, although the reductions in accrual patterns associated with cash-balance plans reduce costs specifically for older employees, cash-balance plans do not possess the hallmarks of an ADEA violation.[208]

It is also doubtful that the results of cash-balance conversions would satisfy the ADEA's requirements for a showing of employer action based on age. As noted above, cash-balance plans calculate benefits on the basis of pay and service rather than age.[209] The ADEA requires that employment decisions be based on age, not merely correlated with age.[210] The Supreme Court has already ruled against an inference of age bias from the conversion to a cash-balance plan.[211] Further, the Court has clarified that, in

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203. *See supra* note 132 and accompanying text.

204. *See supra* Part III.A.2.

205. *See supra* note 130 (noting the concurrence of the IRS's lead counsel with this interpretation).

206. *See supra* note 71 and accompanying text.

207. *See supra* note 150.

208. *See supra* Part III.A.3.

209. *See supra* note 199 and accompanying text.

210. *See supra* notes 151-153 and accompanying text.

211. *See supra* note 153.

employee benefit matters, decisions must be explicitly age-based.[212] Because the decision to convert to a cash-balance plan is made for all employees and, typically, on the basis of cost savings and workforce development,[213] it is unlikely that it would fall under the protections if the ADEA. Further, the law's near foreclosure of disparate impact claims for age discrimination supports the likelihood that cash-balance conversions do not violate the ADEA.[214]

E. Prospects for Reform

Both the Pension Right to Know Act,[215] and the Older Workers Pension Protection Act of 1999,[216] make some progress toward resolving the shortcomings of ERISA, the IRC and the ADEA with respect to cash-balance pension plans. However, in addition to being only proposals and not actually law, both present inadequacies of their own.

When evaluating pension policy, one should not ignore the sharp reduction in pension plan sponsorship in the latter part of the twentieth century. While evidence is mixed, there is some support for the proposition that ERISA and its progeny actually resulted in a net decline in plan participation because of the increased burden of regulatory compliance.[217] Thus, when evaluating a policy proposal, one should not ignore the very real possibility that increased burdens will simply result in employers' abdication of their traditional role in ensuring retirement security. The move toward lower cost options such as defined contribution and cash-balance plans is some evidence of employers' cost consciousness.[218]

The Pension Right to Know Act addresses some of the complexities of the cash-balance issue but fails to specifically address the shortcomings of existing legislation. Its notice requirements would be helpful in demonstrating complex plan changes to plan participants.[219] Such a provision, however, would achieve only a partial victory. Plan participants would be made aware of impending changes and would be able to see the changes'

212. *See supra* notes 151-153 and accompanying text.
213. *See supra* notes 70-71 and accompanying text.
214. *See supra* note 153 and accompanying text.
215. H.R. 1176, 106th Cong. (1999).
216. H.R. 2759, 106th Cong. (1999).
217. *See supra* note 18.
218. *See supra* notes 37-38 and accompanying text.
219. *See supra* notes 157-160 and accompanying text.

specific impacts on their benefits.[220] The proposal, however, would place the burden on employees to collectively oppose such changes. Given the success of IBM employees in publicizing their situation and garnering congressional attention,[221] it is unclear how the proposal would improve the current situation. The Pension Right to Know Act would succeed in making an incremental change that would not impose significant additional costs on plan sponsors. But the minimal protections it would provide would likely not be sufficient.

The Older Workers Pension Protection Act would theoretically pick up where the Pension Right to Know Act leaves off. By amending the ERISA and the IRC,[222] it would fill the gap left by all three of the current legislative schemes. Requiring all plan participants to opt into either the old or new plan would clearly eliminate the loss of future benefits that older workers experience. Further, because new employees would have only the cash-balance option if their employment began after the conversion date, employers could still phase out traditional plans, albeit over a longer period of time. This longer period of time, however, would eliminate the immediate cost savings that employers seek. Thus, the Older Workers Pension Protection Act, while stifling the move to conversion, might result in increased costs and a net reduction in pension coverage. Notwithstanding this danger, the proposal is still the only one pending that addresses the shortcomings of existing law in preventing age-based inequalities in cash-balance pension plans.

Conclusion

Pensions are complicated instruments both for ensuring financial security in retirement and for various employer prerogatives seemingly unrelated to this goal. Abuses in the private pension system prompted the passage of comprehensive regulatory provisions in the 1970s, and attention to the importance of continued prevention has prompted ongoing additions to the legislation. The recent move toward cash-balance plans results from demographic changes in the workforce and employers' need to reduce costs and attract and retain younger workers.

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220. *See supra* notes 157-160 and accompanying text.
221. *See supra* notes 11-12 and accompanying text.
222. *See supra* notes 159-161 and accompanying text.

The move to cash-balance pensions, however justified, can be harmful to older workers. The potential for devaluing the pensions of those most vulnerable to financial fluctuations is inconsistent with the policies that underlie the pension regulatory scheme. Unfortunately, the protections that the law provides are unclear and sometimes inadequate. Proposals for reform make some progress toward enhancing these protections but may not go far enough. Just as the attention to the abuses of old prompted comprehensive protections, it is hoped that the more nuanced abuses of today will garner sufficient attention so as to also prompt appropriate protections.