Cash Balance Conversions under the ADEA— Reconsidered and Reaffirmed

We return to a topic we have discussed before in this space: the legality of cash balance conversions under anti-age discrimination law. Specifically, we consider whether the conversion of a "traditional" defined benefit plan to a cash balance formula violates Section 411(b)(1)(H) of the Code, which states that the "rate of an employee's benefit accrual" may not be reduced "because of the attainment of any age," and the almost identical provisions of ERISA Section 204(b)(1)(H) and ADEA Section 4(i).

We decided to take up this question again for two reasons. First, on reviewing our earlier article, we believe it does not entirely get to the heart of the statutory and policy issues involved. Second, Treasury personnel have said unofficially that Treasury will issue guidance on this topic sometime this year, outlining what kinds of conversions do and do not violate Section 411(b)(1)(H).

One of our favorite themes, as readers probably know, is that the Treasury and Labor Departments should take a stronger lead in defining the law by issuing more guidance on important issues. This issue is almost a case study in point. During the 15-year period following enactment of Section 411(b)(1)(H), Treasury has failed to issue definitive guidance under that section—and in particular failed to issue guidance under that section touching on cash balance plans, which proliferated during that time. At the same time, Treasury blessed cash balance plans in guidance under other Code sections (specifically, in the preamble to its regulations under Code Section 401(a)(4)). Its odd combination of action and inaction have now limited its options. Developments in the law and practice have, to our mind, settled the issue: Cash balance conversions do not implicate Code Section 411(b)(1)(H). Treasury's attempt to decide otherwise in late guidance at this point, we believe would be contrary to law, practice, and policy. Since Treasury's guidance has ranged from nonexistent to permissive, it should not now reverse course and disrupt the many kinds of arrangements—not just cash balance plans, but

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floor-offset plans, some types of early retirement windows, and benefit formula conversions of many kinds—that have been devised by employers acting in good faith in accordance with what they understood to be settled law.

Background

In a defined benefit plan with a cash balance formula, each participant has a hypothetical "account balance" that grows by a stated interest rate plus hypothetical annual "contributions." From the participant's perspective, the balance is his or her "benefit" under the plan at any time.

The conversion controversy has arisen because in some plans, the cash balance formula was adopted to replace a prior benefit formula. Oftentimes, the starting cash balance account is smaller than what had been communicated to participants as their benefit under the "old" formula.

This might happen for a number of reasons. In some plans, the old benefit may have been communicated to participants as a lump sum, equal to the old age-65 annuity discounted at the interest rates and mortality assumptions under Section 417(e)(3) of the Code (required by the Code for converting the age-65 annuity to a benefit paid in any other form at any earlier age). But to set the "new" cash balance account, these plans provide the lump sum value of the old age-65 annuity, but discounted at an interest rate *higher* than the Section 417(e) rate. As a matter of arithmetic, the starting account balance computed using the higher discount rate is smaller than the lump sum value of the age-65 annuity computed using the lower Section 417(e) rate. To take another example, a plan might compute the starting cash balance account by applying the cash balance formula retroactively to all the participant's years of service—so the participant enters the plan formula "as if" it had applied since his first day of work. Depending on a variety of factors, his new starting account balance may be smaller than the lump sum value of his old benefit as communicated under the old formula (that is, the old age-65 annuity, discounted at the 417(e)(3) rate).

However the difference arises, cash balance plans may choose a variety of transition devices to bridge between the larger lump sum that may have been communicated under the old formula, and the smaller starting account balance under the new cash balance formula.

Under a wear-away transition, the participant gets the *greater of* the frozen benefit computed under the old formula, or the new

benefit under the cash balance formula. To express the same thing differently, each participant's benefit under the (new) cash balance formula is "offset" by the frozen benefit under the old plan formula. From the participant's point of view the *net* effect is benefit growth of zero until the new benefit catches up with the old benefit. The period of zero net growth during the catch-up period gives "wear-away" its name.

Why is Treasury concerned about the validity of wear-away transitions under Section 411(b)(1)(H)?

We understand that their concern arises from the construction of a hypothetical transition posed by some commentators. In this hypothetical, when a pair of participants, both younger than normal retirement age, with *identical* service and pay—and thus identical age-65 annuities—are compared, the wear-away amount is larger for the older employee than the younger. For example, consider a 40-year-old and a 50-year-old participant, each with an age-65 annuity of $10,000 per year. Assuming a 417(e)(3) rate of 6 percent, the lump sum value of the "old" benefit to be "worn away" is $33,381 for the 50-year-old employee, but only $18,640 for the 40-year-old. This is of course because of the time value of money. To be entitled to the same age-65 annuity of $10,000, the 50-year-old employee "has" a larger current lump sum benefit than the 40-year-old, because the assets needed to support the benefit have only 15 years to grow for the 50-year-old, compared with 25 for the 40-year-old.

From the larger wear-away amount of the older employee, critics infer that he likewise has a longer wear-away period (that is, years of zero net benefit growth) than the younger. For this reason they conclude that the "rate of an employee's benefit accrual is reduced because of .. age" and so forbidden under Section 411(b)(1)(H) of the Code, and also the substantially identical rules enacted under Sections 204(b)(1)(H) of ERISA and 4(i) of the ADEA. (See, e.g., Edward A. Zelinsky, "The Cash Balance Controversy," 19 *Va. Tax Rev.* 683 (2000).)

The first and most obvious problem with this approach is its divorce from the real world. To obtain the larger wear-away amount for the older participant, it must first assume two participants of identical pay and service. To make its second jump, from larger wear-away *amount* to longer wear-away *period*, it assumes that their post-transition pay and service remain identical, and ignores post-conversion transition devices—such as the supplemental age and service credits and enhanced annuities—designed to cushion the switch for older employees. It thus operates without any showing

that any actual older person has been treated "worse" relative to any actual younger person, in any actual transition.

Moreover, even within its own confining assumptions, it works only when comparing two individuals who have not attained normal retirement age. The hypothetical employee who continues working after age 65 will not necessarily have a longer wear-away amount than any and all hypothetical employees under age 65. So on its own terms, it does not show even a hypothetical world where older employees are systematically treated worse than younger ones.

But even taking this approach at face value, provisionally adopting its assumptions, and conceding for the sake of argument the legitimacy of its application only in a hypothetical world, and then solely to employees who have not reached normal retirement age, we believe that its legal conclusion is in error. Wear-away does not violate either prong of the prohibition of Section 411(b)(1)(H). It does not affect the "rate of benefit accrual," and its effect—whatever it may be—is not "because of age." Moreover, Section 411(b)(1)(H) does not apply before normal retirement age, and so is in any event irrelevant to the transition debate. In the rest of this piece, we seek to show how these principles have developed over the last 15 years, even in the absence of Treasury guidance on the matter.

Wear-away Does Not Reduce the "Rate of Benefit Accrual"

To recapitulate the concerns of the critics of cash balance conversions: In their hypothetical "wear-away" transition, for a pair of participants identical in all respects but age, the wear-away period is longer for the older than the younger. Critics charge that the transition violates Section 411(b)(1)(H) by reducing the older participant's rate of benefit accrual because of age.

The first key assumption underlying this argument is that the zero net benefit growth during each separate year of the wear-away period is the "rate of benefit accrual."

But this assumption is not right. First, when two formulas offset one another, the "rate of benefit accrual" is not necessarily the netted outcome. Rather, it is permitted to be measured separately for each formula. Second, the rate of benefit accrual is not required to be measured on a static, year-by-year basis but rather may be averaged over a multi-year period. When the "rate of benefit accrual" is measured using either or both of these permitted methods, cash balance plan conversions do not reduce the rate of benefit accrual under Section 411(b)(1)(H).

Two Formulas—Two "Rates of Benefit Accrual"

The Seventh Circuit in *Lunn v. Montgomery Ward,* 166 F.3d 880 (7th Cir. 1999), has examined this question in some detail and held that when one benefit formula is offset by another, the rate of benefit accrual under Section 411(b)(1)(H) is determined separately for each formula, and not for one as offset by the other.

The plan at issue in *Lunn* was a floor-offset arrangement. That is, the benefit under the defined benefit formula was offset by that under the defined contribution formula. The defined benefit piece of the annual benefit accrued at 1.5 percent per year of service, both before normal retirement age (age 65) and after.

For benefits accrued after age 65, Mr. Lunn's complaint was with the offset formula. The annual benefit under the defined benefit formula was offset by the *annuitized value* of the account balance in the defined contribution formula. For any two participants of identical pay and service who continued working after age 65, the offset was greater for the older than the younger, *solely* because of age. (The reason is math and actuarial fact: After age 65, the same account balance yields a larger annuity for an older employee than for a younger employee, because of the latter's longer life expectancy.) Mr. Lunn argued that systematically increasing offset of the post-age 65 benefit violated ERISA Section 204(b)(1)(H).

The post-age-65 offset under the *Lunn* floor-offset plan, of course, is the mirror image of the pre-age-65 offset in a cash balance plan. In the *Lunn* plan, the defined benefit annuity was offset by the annuitized value of the defined contribution account balance. In a cash balance plan, the pre-age 65, defined-contribution-like "account balance" is offset on a current basis by the lump sum value of the age-65 annuity. In both, holding all else equal, the offset is larger for the older employee than the younger, for the same actuarial and mathematical reasons.

Acknowledging the mathematical result of the offset formula, the court held it still did not violate ERISA Section 204(b)(1)(H)—even though correlated directly with age. The reason, the court held, is that the *rate of benefit accrual* was not affected by the offset. Rather the participant kept "accruing benefits in exactly the same way he had been doing before he turned age 65, until he retired." There was no violation of Section 204(b)(1)(H), because his *rate of accrual remained the same.* Reasoned the court, "he was treated the same as all other workers. . . ." *(Lunn v. Montgomery Ward,* 166 F.3d at 883.)

The *Lunn* court, that is, held that there was no ERISA Section 204(b)(1)(H) violation, even though the net impact of the wear-away

was *systematically greater for older participants than younger participants.* The court based its holding on its reasoning that the "rate of benefit accrual" applied to each of the two formulas separately—and not to the formulas netted together.

Policy and Practice. It is not only case law that has stolen a march on Treasury on deciding what "rate of benefit accrual" is when two formulas offset one another. Administrative practice has evolved as well to support our position. Other reasonable formulas that have not raised red flags under current IRS practice may give rise to plan disqualification if Treasury insists on applying Section 411(b)(1)(H) to the netted result of two offsetting formulas.

For example, some companies have adopted noncontingent or "non-elective" early retirement window benefits. (A company may wish to adopt this kind of window because in some circumstances, its treatment for accounting purposes may be more favorable than that for the more common, elective window. See, e.g., Ethan Lipsig, *Downsizing,* 166-7, Bureau of National Affairs, Washington, DC (1996).) Under one type of such arrangement, a defined benefit plan, with a benefit based on final average pay times years of service, might credit an additional three years of service to every participant who has attained age 55 by a certain date. Rather than conditioning the benefit increase on a timely election and retirement during a "window" period, the plan instead gives participants in this age cohort the better of the benefit computed under the old formula (i.e., without the additional three years) and the new formula (with the three years). During the three-year period, while their benefit under the old formula catches up with the window benefit, participants in the affected age group have a net accrual of zero (except, of course, accruals based on pay increases).

For affected participants, the three-year wear-away period is in some sense "because" they reached the specified age of 55. Likewise, their *net* accrual growth in that period is lower than that of younger participants "because" they are older. Accordingly, as the term is construed by critics of cash balance conversions, their "rate of benefit accrual" is impermissibly reduced. We think that from a policy perspective, a more reasonable reading of this scenario is to conclude that for affected participants, the "rate of benefit accrual" for Section 411(b)(1)(H) purposes is in fact unchanged, and is not reduced relative to that of younger participants. This more reasonable conclusion is the result of applying the "rate of benefit accrual" only separately

to the old benefit formula and the offsetting new benefit formula, without regard to the offset.

To our knowledge, this kind of window has not been challenged by the IRS under Section 411(b)(1)(H). Thus, the non-elective window both makes sense from a policy perspective (older participants get a benefit enhancement without a forced "rush for the door") and enjoys the passive blessing of administrative practice. We believe that, were Treasury to attempt at this late stage to fill a regulatory vacuum by adopting a new measurement of "rate of benefit accrual" for two offsetting formulas, it would disrupt legitimately settled expectations regarding the legitimacy of this arrangement as well as cash balance plans—for no clear-cut legal justification or policy rationale.

Similar Approach in Anti-Backloading Rules. It is true that when two formulas offset one another, Treasury has issued no formal guidance on how to measure the Section 411(b)(1)(H) "rate of benefit accrual." But Treasury has done so for measuring the growth of the Section 411(a)(7) "accrued benefit" for purposes of the anti-backloading rules of Section 411(b). (The rate of benefit accrual under Section 411(b)(1)(H) is of course not necessarily the same as the rate of growth of the Section 411(a)(7) accrued benefit.) And in this area, Treasury guidance adopts the same principle we urge is correct for Section 411(b)(1)(H): When two formulas offset one another, the rate of growth in the accrued benefit may be measured separately for purposes of the anti-backloading rules.

In many plans, a participant's net benefit is expressed as the "greater of" two benefit formulas. A "greater of" benefit formula is of course just another way of expressing an offset or wear-away formula. However it is named, the participant gets only the bigger of two benefits. ("Wear-away" is often used to describe the offset of a dynamic with a frozen formula, and "greater of" an offset of two dynamic formulas—but in either the key arithmetical operation is subtraction.) When this happens, the antibackloading rule is permitted to be determined separately for each formula, without netting the offset of one by the other. Under this application of the anti-backloading rule, the rule is satisfied if each formula meets it alone.

We understand that recent, informal IRS practice may have backed away from this application of the anti-backloading rule. But it is only because of this principle—applied both in formal guidance and administrative practice—that so many traditional arrangements pass muster under the anti-backloading rules.

As an example of formal guidance, consider the garden variety floor-offset arrangement. In Revenue Ruling 76-259, 1976-2 C.B. I I 1, the Service held that a floor-offset arrangement satisfies the anti-backloading rules if the defined benefit formula satisfies Code Section 411 (b)(1), determined without regard to the offset. Without this principle, the floor-offset arrangement would fall astray of the anti-backloading rules.

This same principle supports the legality of many wear-away or "better of" formulas—many of them expressly condoned or commanded by Treasury guidance. For example, recall the transition rules in Treasury's regulations implementing the changes in Sections 401(a)(4) and 401(a)(17) enacted by the Tax Reform Act of 1986. (Broadly speaking, changes in these sections limited the amount of benefit under a qualified plan that could be earned by high paid employees relative to lower paid employees.) Under various "wear-away" formulas, Treasury allowed the (lower) benefits of high paid employees earned under the new, post-'86 Act formulas, to be offset by the higher benefit accrued before. For some participants, this resulted in sharply reduced or even zero net benefit accruals for some number of years. Treasury did not scrutinize the legality of these formulas under the anti-backloading rules—nor did it have the statutory authority to waive their application. These formulas were non-problematic under Section 411(b) for the reason that the anti-backloading rules were not implicated: the rate of growth in the accrued benefit for this purpose was determined for each of the pre- and post-'86 Act formulas separately, rather than as offset one by the other.

As an example of administrative practice, consider the IRS's position with respect to wear-away formulas arising in other transitions as well. For a variety of business reasons—for example, changing competitive needs, or a reorganization or merger—participants with an accrued benefit under one plan or formula may suddenly be placed under a new plan or formula with a less generous benefit. A common transition device is to give affected employees the "greater of" the frozen accrued benefit under the old formula and that of the new formula. During the wear-away period while the new benefit catches up to the old benefit, affected participants may have a net accrual rate of zero. These are typically tested for compliance with the anti-backloading rules by testing each formula separately, and the IRS routinely has approved this approach in determination letter reviews. (See Letter of the American Academy of Actuaries Pension Committee to Paul Shultz, Director, Employee Plans, Rulings and Agreements, Internal Revenue Service, Sept. 14, 2000.)

By blessing this approach for so many years formally and informally in measuring the growth of the "accrued benefit," Treasury has left itself without a principled way of adopting a different way of measuring the "rate of benefit accrual."

"Rate of Benefit Accrual" Is Not a Static Year-by-Year Concept

By focusing on the zero benefit growth in each of the wear-away years, critics of cash balance conversions also assume that the "rate of benefit accrual" must be measured separately in each year without regard to what happens in any other year. But there is no legal basis for this assumption. Moreover, during the period that Treasury has remained silent on this issue, administrative practice, as well as Treasury guidance applied in analogous areas, has led us to conclude the opposite: the "rate of benefit accrual" should be permitted to be measured on an averaged basis over a multi-year period.

Consider again our earlier example of the nonelective benefit window. Recall that the plan in this example gives employees who have attained age 55 a significant, onetime benefit enhancement, and allows it to wear-away over the next three years. During this three-year period, affected participants' rate of accrual is zero (assuming zero pay raises) when measured on an annual basis. But when measured since their date of hire, it is identical to that of all other participants. From the perspective of what they ultimately get from the plan, their "rate of benefit accrual" is unaffected by age. The averaging of their benefit accrual rate over a multi-year period reflects this fact, and should be the correct way of viewing "rate of benefit accrual."

But this should not be the right result. Upon reaching age 55 in this example, participants are *always* better off with the one-time $1,000 (plus interest), than with the annual contribution of $1,000. Among other things, the one-time contribution of $ 1,000 works as a death benefit as well as a pension benefit. If the critics' basic assumption reaches a result contrary to common sense and policy, it must be wrong.

Treasury has of course not issued guidance on whether the "rate of benefit accrual" under Section 411(b)(1)(H) must be measured for each year, in isolation of every other. But it has considered how to measure the growth rate of the accrued benefit for other purposes—and decided against such an approach. For example, for measuring the rate of growth of the Section 411(a)(7) "accrued benefit" for purposes of the nondiscrimination rules under Code Section 401(a)(4),

Treasury has already concluded that the rate does not have to be measured on an annual basis. Treasury regulations rather allow the plan to measure the "normal accrual rate" in a number of ways—including the rate measured on an average basis taking into account the current year and all prior years of participation. (Treas. Reg. §1.401(a)(4)-3(d)(1)(iii).)

In short, in concluding that wear-away violates Section 411(b)(1)(H), critics of cash balance conversions start by assuming that the "rate of benefit accrual" must be measured by comparing the net benefit increase from year to year. But nothing in legislative history supports this assumption. Administrative practice has not adopted it. Treasury guidance applied to the analogous normal accrual rate under the Section 401(a)(4) regulations suggests that the assumption is incorrect. Policy considerations suggest that it is dead wrong.

Disruption. We have seen that law and practice have developed under Section 411(b)(1)(H) without guidance from the agencies—and Treasury's intervention now would disrupt not only cash balance plans, but other conventional arrangements as well. The *Lunn* court has upheld the validity of floor offset plans under Section 411(b)(1)(H) by deciding that the two offsetting formulas may be scrutinized under that section separately. If Treasury were to override the *Lunn* principle, it would disqualify typical floor-offset arrangements, with no apparent warning or justification. If it were to confine *Lunn* to floor-offset plans, it would of course spare these plans—but threaten the status of cash balance plans, also without warning, and, in light of *Lunn,* without apparent legal justification or principle. In either case, it would throw into doubt the legal status of the kind of elective window benefit we have discussed above. And it would even throw into doubt the underlying principle by which employers have measured the rate of accrued benefit in all sorts of common and (until now) nonproblematic benefit transition arrangements.

Wear-away Is Not "Because of" Age

To return again to the purely abstract case posited by the critics of cash balance conversions: For a pair of hypothetical participants, identical in pay and service but not age, the wear-away period is longer for the older than the younger. For this reason, critics argue that wear-away reduces the rate of benefit accrual of the older participant "because of . . . age" in violation of Section 411(b)(1)(H).

In the real world, of course, cash balance wear-aways arise for a number of different reasons in addition to age. But even if one takes the critics' example at face value, and assumes that the participant's age is one factor—solely because his or her wear-away period is determined in part by the number of years until age 65—Section 411(b)(1)(H) is not violated. This is because the wear-away is not "because of" age in the sense required by the statute.

The longer wear-away period for the older participant as a mathematical matter is "because of" the fact that the current lump sum value of the age-65 benefit earned under the old formula is *greater* than that of the same age-65 benefit of the younger participant. And it is greater *only* because the participant is closer to age 65. To put this another way, the current value of the older employee's old benefit entitlement when measured on any date is bigger than that of the younger employee—and *only* because the participant is older.

Moreover, having decided to provide the older employee with benefits of a higher current dollar value as of any date, the employer in this example decides to remediate or "level the playing field" for the younger employee. The employer decides that for any two employees of equal pay and service, the current value of their benefit entitlement should be equal.

The conversion, in short, produces a longer wear-away for the older employee only "because of," first, the employer's prior decision to give benefits that,—all else equal,—are always larger for the older employee when measured in current dollar value, and second, the employer's later decision to equalize the benefit structure and give the same current dollar value of benefits to participants regardless of age.

We think that Congress did not intend that this kind of age-based remediation was prohibited discrimination "because of" age. Any number of examples bear this out.

Consider again the earlier example of the non-elective early retirement window. Recall that the plan in this example (1) credited an extra three years of service to participants who had attained age 55 by a certain date, and (2) gave these participants a benefit equal to *the greater of* the enhanced benefit (with the three years) or the benefit under the old formula (without the three years). That is, the formula provided a three-year "wear-away period" during which the benefit of every employee in this age cohort had a net growth of zero.

In one sense, the zero net growth of the benefit in this group is "because of" age—because correlated strictly with individuals who

had attained age 55 as of a date certain. It is in this narrow sense that critics of cash balance conversion use "because of" under Section 411(b)(1)(H).

But under a more comprehensive and more accurate view of what has happened in this example, the wear-away for the over-age-55 group is "because of" the more favorable treatment given on a one-time basis, coupled with the employer's decision to let younger employees catch up over the next three years. It is this initial, more favorable treatment, that is the "but for" or necessary cause of the wear-away. Without this more favorable treatment, plus the employer's decision to remediate or "level the playing field," there would be no wear-away issue.

As a second example, consider a pension plan with a final average pay formula that provides 1 percent of pay for years of service for employees under age 55, and 1.3 percent to employees age 55 and older. (A similar example was presented in the Submission of the ERISA Industry Committee to the Treasury Department Regarding the Treatment of Wear-away under I.R.C. §411(b)(1)(H), Nov. 26, 2001, at 5.) The employer in this example amends the plan to provide that the participant's benefit will be the greater of (1) his frozen accrued benefit as of the date of the amendment; or (2) the benefit produced by applying 1.1 percent to all years of service. For employees over age 55, this will produce a wear-away period of net zero benefit growth for some period of time.

As in the first example, the wear-away for the older employees arises only "because" the employer once treated them more favorably than younger employees, and later seeks to level the playing field.

Our third example is more in the nature of a thought experiment. Consider a money purchase pension plan that provides a $1,000 contribution every year. At age 55, every participant gets a contribution of $10,000—and nothing more in any succeeding year. After age 55, that is, each participant's allocations are zero. (Assume also that for new hires after age 55, or participants who continue to work after age 65, the plan provides annual contribution of $1,000, plus interest credits.)

As the cash balance critics would have it, the zero allocations after age 55 arise "because of" age, and are prohibited, even though every participant is better off with the one-time contribution of $10,000 than with $1,000 every year over ten years. We believe this answer is contrary to common sense and policy.

In all three examples, older employees experience a "wear-away" related entirely to age, because earlier favorable treatment was

based entirely on age, and later policy reversed the age-based tilt. No sensible policy is served by concluding that these three examples violate Section 411(b)(1)(H). If "reverse age discrimination is not the theory of ERISA," (*Lunn v. Montgomery Ward,* 166 F.3d 880, 883 (7th Cir. 1999)), then attempts to remediate past favorable treatment should not violate age discrimination law, including Section 411(b)(1)(H).

Additional ADEA Considerations

We should note that before enactment of Section 411(b)(1)(H) and its corresponding ERISA and ADEA provisions, Section 4(a) of ERISA made it unlawful for an employer to discriminate against an employee with respect to the terms and conditions of employment "because of" age. The circuits are split on the question of whether "because of" under Section 4(a) requires an "intent" to discriminate, or an "age based animus." The Supreme Court is expected to resolve this issue this term in *Adams v. Florida Power Corp.,* 255 F.3d 1322 (11th Cir. 2001), certiorari granted, December 3, 2001. We expect that the meaning of "because of" under Section 411(b)(1)(H) and the nearly identical ADEA Section 4(i) will be further developed after this case is decided.

Section 411(b)(1)(H) Does Not Apply Before Normal Retirement Age

We assume Treasury's pending guidance is intended to apply to cash balance transitions affecting participants of any age. If so, the guidance raises another problem as well. While the statute is not clear, we believe the better reading of Section 411(b)(1)(H) is that it does not apply to individuals who have not attained normal retirement age. Again, on this issue case law has run ahead of Treasury guidance, and decided in favor of this reading.

Section 411(b)(1)(H) itself forbids discrimination "because of the attainment of any age." But the header confines the statute to accruals after normal retirement age. The Conference Committee report is clear that the statute applies only to accruals after normal retirement age:

> Under the conference agreement, the rules preventing the reduction or cessation of benefit accruals on account of the attainment of age are not intended to apply in cases in which a plan *satisfies the normal*

> *benefit accrual requirements* for employees who have not attained normal retirement age.

(H. Conf. Rep. No. 112, 99th Cong. 2d Sess. 379 (1986) [emphasis supplied].) Numerous floor statements confirm that Congress thought it was applying the statute only to accruals after normal retirement age. (See statements of Reps. Roukema, Jeffords, Clay, 132 Cong. Rec. H 11437 et. seq. (Oct. 17, 1986).) On the basis of this legislative history and other evidence, the district court in *Eaton v. Onan Corporation,* 117 F.Supp.2d 812 (S.D. Ind. 2000), concluded that the statute is apparently intended to apply only to benefit accruals after normal retirement age.

Conclusion

If, as Treasury has indicated, pending guidance would hold certain wear-away conversions to be illegal under Code Section 411(b)(1)(H), it would run contrary to case law and disrupt much common practice. It would wrongly imply that the "rate of benefit accrual" for any two formulas had to be measured on a netted basis, and only from one year to the next. This would disrupt not only cash balance plans, but also common floor-offset arrangements and various kinds of window benefits and transition devises. It would wrongly imply that "because of . . . age" included employers' attempts to remediate past age-based discriminations.

It would cause all these disruptions in large measure because Treasury failed to act for so many years with respect to the issue of cash balance plans under Section 411(b)(1)(H)—both as to the basic formula, and as to cash balance conversions. By its inaction under Section 411(b)(1)(H), Treasury forced employers to rely on the only guidance available to them as to the legitimacy of cash balance plans and conversion issues under that section. And all this guidance was favorable: the *Lunn* holding under "mirror" ERISA Section 204(b)(1)(H); Treasury's treatment of analogous issues with respect to measurement of the rate of growth in the accrued benefit for purposes of the anti-backloading rules; the IRS's apparent willingness to bless a variety of arrangements that implicate Section 411(b)(1)(H), including cash balance conversions, floor-offset plans, and non-elective window benefits, in determination letters.

Having failed to take the lead, Treasury, in our view, should now rationalize the law it has allowed to develop. Treasury should issue guidance formalizing and systematizing what has been understood

for many years: cash balance plans, and conversions to cash balance plans, do not violate Section 411(b)(1)(H), and do not implicate age discrimination law.

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This is our last editorial in this space. We are turning over the editorial reins to new hands so that we can spend more time on writing and less on editing. After this issue, we will write a quarterly "Perspective" as Contributing Editors.