

# THE CRISIS IN CORPORATE AMERICA: PRIVATE PENSION LIABILITY AND PROPOSALS FOR REFORM

T. Leigh Anenson, J.D., LL.M.\*

Karen Eilers Lahey, Ph.D.\*\*

The defined benefit system and the federal insurance program that stands behind it are being tested more severely than at any time since enactment of ERISA 30 years ago. At stake is the viability of one of the principal means of providing stable retirement income to millions of American workers. Although the challenges are multi-faceted, defy easy answers and demand a careful balancing of interests to devise workable solutions, such solutions are achievable. The time to act is now.

Bradley D. Belt, Executive Director, Pension Benefits Guaranty Corporation.<sup>1</sup>

## I. INTRODUCTION

On September 2, 1974, Congress enacted the Employment Retirement Income Security Act (ERISA) to preserve and protect the pension plans of millions of American workers.<sup>2</sup> At that time, a series of business failures resulting in the loss of promised plan benefits had prompted Congress to seek corrective legislation.<sup>3</sup> ERISA aimed to safeguard employer-

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\* Assistant Professor of Business Law, University of Nevada, Las Vegas and Of Counsel, Reminger & Reminger Co. L.P.A. The authors thank Erin Bonta-Lewis and Joshua Dean for their research assistance. This article was awarded the Distinguished Paper at the 2006 Annual Conference of the Tri-State Academy of Legal Studies in Business held in Cleveland, Ohio.

\*\* Charles Herberich Professor of Real Estate, Department of Finance, University of Akron College of Business Administration.

1. 2004 ANNUAL REPORT, PENSION BENEFIT GUARANTY CORPORATION 10 (Mar. 1, 2005) (Executive Director's Report) [hereinafter 2004 PBGC ANNUAL REPORT].

2. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974); *see also* ERISA §§ 1-4402. ERISA's tax provisions are duplicated in I.R.C. §§ 400-25 and its nontax provisions are recodified at 29 U.S.C. §§ 1001-1461 (2000).

3. *See generally* James A. Wooten, "The Most Glorious Story of Failure in the

sponsored pensions by mandating adequate funding levels and plan termination insurance.<sup>4</sup>

Today, more than three decades later, it is clear that neither method will likely provide the pension protection originally intended in the statute. In fact, the present economic and social environment has potentially placed thirty-two thousand pension plans covering forty-four million workers in jeopardy along with the program that insures them.<sup>5</sup> Asset funding levels of defined benefit pension plans are well below minimum legislative standards, with total under-funding estimated at more than \$650 billion.<sup>6</sup> Moreover, the Pension Benefit Guaranty Corporation (PBGC) created by ERISA to insure against plan termination and support employees with minimum benefits no longer has sufficient assets to meet its long-term liabilities.<sup>7</sup>

Given the dire financial condition of defined benefit plans in the private sector<sup>8</sup> and the impending demise of their insurer, legal scholars have contributed their ideas to the pension reform discussion.<sup>9</sup> Various

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*Business*": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (detailing the history and origins of ERISA); see also JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 1-28 (3d ed. 2000) (explaining historical development of the private pension system).

4. 26 U.S.C. § 412 (establishing minimum funding standards); 29 U.S.C. §§ 1321(a), 1321(b)(1), 1301-1461 (2000) (establishing plan termination insurance). ERISA's other reforms included imposing fiduciary duties, see 26 U.S.C. §§ 404(a)(1)(B), 409; vesting requirements, see 26 U.S.C. § 411; and participation standards, see 26 U.S.C. § 401(a)(26).

5. 2005 PERFORMANCE & ACCOUNTABILITY REPORT, PENSION BENEFIT GUARANTY CORPORATION 1 (Nov. 15, 2005) [hereinafter 2005 PBGC Performance & Accountability Report]; see also 2005 Annual Report, Pension Benefit Guaranty Corporation (June 28, 2006) [hereinafter 2005 PBGC Annual Report].

6. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 13; see also 2004 PBGC ANNUAL REPORT, *supra* note 1, at 16-17 (reporting total under-funding exceeding \$600).

7. "[I]t is clear that the Corporation does not have sufficient resources to meet all of its long-term obligations." 2004 PBGC ANNUAL REPORT, *supra* note 1, at 1. In 2004, the PBGC experienced the largest loss in its thirty year history. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 4. As discussed *infra* Part IV.A., its financial position eroded by \$12.042 billion, more than doubling its deficit to \$23.541 billion. *Id.* at 14, 21.

8. Most public sector defined benefit plans are also in an extremely vulnerable financial condition. For an analysis of public pension plans and proposals for reform, see Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, Vol. 21, No. 1, Notre Dame Journal of Law, Ethics, & Public Policy, publication forthcoming Spring 2007.

9. See, e.g., Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607 (2000) (suggesting voluntary insurance coverage for defined contribution plans); Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 69-70 (2004) (proposing mandatory defined benefit or contribution plan prior to the establishment of 401(k) plans or mandate matching funds in 401(k) plans); Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 67 (1991) (proposing "to transfer primary responsibility for monitoring

bills have also entered the legislative process seeking to solve the current crisis in corporate America.<sup>10</sup> One such bill – the Pension Protection Act of 2006 – recently became law on August 17, 2006.<sup>11</sup>

This article adds to the growing debate over private pensions by proposing two reforms. First, it concurs with the recently enacted legislation that legitimates employer transition to the cash balance form of pension plan. Second, in contrast to the new statute, it suggests a reduction in insurance benefits payable to participants of terminated plans and/or an extension of the age of retirement to promote the continued viability of the PBGC. These proposals best accomplish ERISA's primary purpose of pension protection as well as account for the fundamental changes in the employment relationship that have developed since its enactment.

Part II reviews the role of private pensions as part of the employment relationship. Part III explains three popular pension plans and discusses employer attitudes and objectives that may influence the choice between them. Part IV delineates the private pension dilemma and its determinants. It details the unfunded liabilities of defined benefit plans and the related fiscal distress of the PBGC. It also describes the environmental factors influencing the problem. Part V outlines the two proposed reforms and their justifications in light of economic, social, and political realities. The

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employers' pension funding from the PBGC to private creditors"); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 529-30, 532-33 (2004) (proposing to legitimate cash balance plans and to limit employer stock in defined contribution plans); Kathleen H. Czarney, Note, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 191-95 (2004) (proposing portion of defined benefit pension assets be invested in FDIC insured accounts).

10. See, e.g., Preservation of Defined Benefit Plans Act of 2005, H.R. 4274, 109th Cong. (2005) (introduced Nov. 9, 2005); Pension Security Disclosure Act of 2005, H.R. 2321, 109th Cong. (2005) (introduced May 12, 2005); Pension Preservation and Savings Expansion Act of 2005, H.R. 1960/1961, 109th Cong. (2005) (introduced April 28, 2005); Pension Fairness and Full Disclosure Act of 2005, S. 991, 109th Cong. (2005) (introduced May 10, 2005); Employee Pension Preservation Act of 2005, S. 861, 109th Cong. (2005) (introduced April 20, 2005). While there has been new urgency due to the increased rate of business failures and unfunded liabilities discussed *infra* at Part IV, pension reform has never left the legislative agenda. See EVERETT T. ALLEN, JR., JOSEPH J. MELONE, JERRY S. ROSENBLUM & DENNIS F. MAHONEY, *PENSION PLANNING: PENSION, PROFIT-SHARING, AND OTHER DEFERRED COMPENSATION PLANS* 17-21 (9th ed. 2003) (discussing no less than twenty different federal statutes affecting pensions since the enactment of ERISA).

11. The new statute is the most comprehensive pension reform legislation in at least a decade. See Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006) (previously the Pension Security and Transparency Act of 2005, S. 1783/H.R. 2830, 109th Cong. (2005)), available at <http://waysandmeans.house.gov/media/pdf/taxdocs/pensiontextpt1.pdf>; see also Legislative Notice, U.S. Senate Republican Policy Committee, *H.R. 4 – Pension Protection Act of 2006* (Aug. 2, 2006), available at [http://rpc.senate.gov/\\_files/L53HR4Pensions080206DK.pdf](http://rpc.senate.gov/_files/L53HR4Pensions080206DK.pdf) (discussing history of the legislation).

article concludes that the suggested options are a viable means to the end of encouraging the continued growth of private pensions in the twenty-first century.

## II. ROLE OF PENSIONS IN THE EMPLOYMENT RELATIONSHIP

Private pensions mutually benefit both employers and employees. They offer advantages to the employer by solving the problem of diminished productivity due to advanced age.<sup>12</sup> At some point, an employee's contribution to the productivity of a firm may be worth less than his or her compensation. Establishing a pension plan permits employers to encourage retirement while simultaneously reducing the inefficiencies associated with retaining employees beyond their productive years.<sup>13</sup> Compared to terminating employees whose wages outpace their value, morale and productivity will often be maximized through the provision of a pension.<sup>14</sup>

Offering a pension plan also permits an employer to systematically replenish its workforce by keeping the channels of promotion open to younger workers.<sup>15</sup> While transferring aging employees to less demanding and lower income positions may be possible, such an alternative only delays the inevitable productivity problem.<sup>16</sup> Furthermore, an employer's contributions to a qualified plan are deductible for federal income tax purposes.<sup>17</sup> Tax deductions allow a portion of the plan's liabilities to be funded at lower cost to the firm.

Pension plans provide employees economic security at a time when employment opportunities are limited or non-existent but financial needs, especially health care, are still substantial.<sup>18</sup> With the ever increasing longevity of the population, the need for financial security during retirement is evident.<sup>19</sup> Another employee benefit of pensions is that

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12. ALLEN ET AL., *supra* note 10, at 9-10.

13. *Id.*

14. *Id.* at 10.

15. *Id.* For workers still in their productive prime, however, the 'tight' labor market may oblige employers to encourage the continuation of employment. See Robert L. Clark & Sylvester J. Schieber, *Taking the Subsidy Out of Early Retirement: Converting to Hybrid Pensions*, in INNOVATIONS IN RETIREMENT FINANCING 169-70 (Olivia S. Mitchell, Zvi Bodie, P. Brett Hammond & Stephen Zeldes eds., 2002) (discussing the role of pensions and national retirement policy).

16. ALLEN ET AL., *supra* note 10, at 9-10.

17. *Id.* at 10-11.

18. *Id.* at 7-8; see also Anna M. Rappaport, *Planning for Health Care Needs in Retirement*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 288 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000) (discussing the increase in healthcare cost and need that accompanies the aging process).

19. See discussion *infra*, Part IV.B.2.

employer contributions to a qualified plan do not constitute taxable income.<sup>20</sup> Pension benefits are taxed at distribution when an employee is presumably in a lower income tax bracket.<sup>21</sup>

Pensions are especially important because the minimum benefits available pursuant to Social Security, coupled with its failing financial health, leaves the government guarantee of income under that program uncertain.<sup>22</sup> Personal savings are still an option, but more people are choosing to maintain a relatively high standard of living during their pre-retirement years and forego accumulated savings for old age.<sup>23</sup> The declining level of voluntary savings means that pensions as a form of forced savings are critical to protect against the economic risk of old age.<sup>24</sup> Because pensions are beneficial to both employers and employees, it is not surprising that more than half of the population of full-time private sector workers participate in some form of pension plan.<sup>25</sup>

### III. PENSION PLAN SELECTION AND EMPLOYER OBJECTIVES

Employers are not required to provide pensions, and if they do, the law does not mandate a selection between them. There is a wide selection of plan types as well as flexibility of plan design.<sup>26</sup> To assist in the evaluation of the reform proposals outlined below, the next section will describe three popular plans and then discuss employer attitudes and objectives that may influence the choice between them.

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20. Lee G. Knight, Ray A. Knight, & Wayne T. Nix, *An Application of the Analytic Hierarchy Process To Tax Policy Decisions: The Termination of Overfunded Pension Plans*, 12 AM. J. TAX POL'Y 101, 106 (1995); see also Daniel I. Halperin, *Interest in Disguise: Taxing the "Time Value of Money,"* 95 YALE L.J. 506 (1986) (discussing the tax implications of time).

21. ALLEN ET AL., *supra* note 10, at 37.

22. For researchers seeking information on expected social security benefits, see Olivia S. Mitchell, Jan Olson, & Thomas L. Steinmeier, *Social Security Earnings and Projected Benefits*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 327 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000).

23. ALLEN ET AL., *supra* note 10, at 7 (noting that personal savings rates are "running at historically low levels" and citing "[a]dvertising, installment credit, and the media of mass communications" as factors influencing their restricted growth).

24. ALLEN ET AL., *supra* note 10, at 14.

25. Joint Comm. On Tax'n, Present Law and Background Relating to Employer-Sponsored Defined Benefit Plans 28 (JCX-71-02, 2002). "[W]ell over half all U.S. workers in their 50s anticipate a future pension . . ." Alan L. Gustman, Olivia S. Mitchell, Andrew A. Samwick, & Thomas L. Steinmeier, *Evaluating Pension Entitlements*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 310 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000).

26. See generally DALLAS L. SALISBURY, REGULATORY ENVIRONMENT OF EMPLOYEE BENEFIT PLANS, THE HANDBOOK OF EMPLOYEE BENEFITS (5<sup>th</sup> ed. 2001); PENSION PLAN GUIDE (CCH) (providing pension plans rules and regulations).

### A. *Choice of Private Pension Plans*

Three kinds of pension plans predominate in the private sector. They are the defined benefit plan, the defined contribution plan, and the hybrid cash balance defined benefit plan.

#### 1. Defined Benefit Plan

Under a defined benefit pension plan, the employer provides a determinable benefit, usually related to an employee's service and/or pay.<sup>27</sup> Retirement benefits depend on a calculation of average earnings either under a final average or career average formula<sup>28</sup> that tend to favor long-career workers.<sup>29</sup> The payment at retirement is annuitized for the life of the employee.<sup>30</sup> Subsidized early retirement benefits are also usually embedded into defined benefit plans.<sup>31</sup>

Moreover, the employer assumes the investment risk.<sup>32</sup> This means that returns above the promised benefit will inure to its benefit.<sup>33</sup> Returns below the promised payout, however, will have to be funded by the employer.<sup>34</sup> Thus, the employer's cost includes the amount necessary to provide the benefit as well as administrative and actuarial expenses.<sup>35</sup> Because defined benefit pensions are insured against default by the PBGC, an employer will additionally pay insurance premiums per employee for each employee participating in the pension program.<sup>36</sup> Employers will also

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27. ALLEN ET AL., *supra* note 10, at 47.

28. Clark & Schieber, *supra* note 15, at 151. The final-pay provision bases benefits on earnings averaged, for example, over the last three years of employment or over the three consecutive years in a ten year period immediately prior to retirement in which earnings are the highest. ALLEN ET AL., *supra* note 10, at 229-34. The career-pay provision bases benefits on earnings averaged over the entire career of employment. *Id.*

29. Older participants earn more benefits in their later years because these are the years of their highest salary and greatest seniority along with the years closest to retirement. Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683, 720 (2000).

30. 1 GARY I. BOREN & NORMAN P. STEIN, QUALIFIED DEFERRED COMPENSATION PLANS § 1:07 (2001).

31. Clark & Schieber, *supra* note 15, at 152-53 (citing several studies by economists on retirement incentives embedded in retirement systems).

32. 3 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS P 61.1.2 (3d ed. 2001).

33. *Id.*

34. LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 35 (2004).

35. See ALLEN ET AL., *supra* note 10, at 225-81; Norman Stein, *An Alphabet Soup Agenda for Reform of the Internal Revenue Code and ERISA Provisions Applicable to Qualified Deferred Compensation Plans*, 56 SMU L. REV. 627, 641 (2003); see also Zelinsky, *supra* note 9, at 455 (noting that defined benefit plans are a fixed cost unrelated to profitability).

36. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 11; see

pay variable rate premiums should their funding ratios fall below the statutory average.<sup>37</sup>

## 2. Defined Contribution Plan

Under a defined contribution pension plan, the employer's contribution is fixed and accumulates to provide whatever amount of benefit exists at retirement.<sup>38</sup> A well-known defined contribution pension plan is the 401(k) plan.<sup>39</sup> Because the employee (and not the employer) assumes the investment risk, his or her benefit becomes the variable as opposed to the employer's contribution.<sup>40</sup> Defined contribution arrangements typically do not provide life-time annuity payments, but rather allocate benefits in one lump sum.<sup>41</sup> The single payment enhances the account's portability and is advantageous to employees who end their employment relationship prior to retirement.<sup>42</sup> The potential disadvantage to employees, however, is that they may outlive their retirement resources.<sup>43</sup>

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*also* discussion *infra* at Part IV.A and note 218.

37. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 8, 11, 43; *see also* discussion *infra* at Part IV.A and note 213. The Pension Protection Act of 2006 calls for one hundred percent funding. *See, e.g.*, Pension Protection Act of 2006, *supra* note 11, tit. IV.

38. ALICIA H. MUNNELL & ANNIKA SUNDÈN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 2 (Brookings Institution Press 2004); Jonathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 L. REV. MICH. ST. U.-DET. C.L. 187, 193-94. The contribution formula is based on salary and sometimes length of service. MICHAEL J. CANAN & DAVID RHETT BAKER, QUALIFIED RETIREMENT PLANS § 3.12 (2001).

39. *See* Robert L. Clark, Gordon P. Goodfellow, Sylvester J. Schieber, & Drew Warwick, *Making the Most of 401(k) Plans: Who's Choosing What and Why?*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 95 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000); *see also* Sharon Reece, *Enron: The Final Straw and How To Build Pensions of Brick*, 41 DUQ. L. REV. 69, 78 (2002) (listing various defined contribution plans such as 401(k), profit sharing, stock bonus, money purchase, ESOPs, and 403(b)).

40. ALLEN ET AL., *supra* note 10, at 48.

41. LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT 11.02 (2000).

42. MUNNELL & SUNDÈN, *supra* note 38, at 2-3.

43. Jeffrey R. Brown, Olivia S. Mitchell, & James M. Poterba, *Mortality Risk, Inflation Risk, and Annuity Products*, in INNOVATIONS IN RETIREMENT FINANCING (Olivia S. Mitchell, Zvi Bodie, P. Brett Hammond, & Stephen Zeldes eds., 2002). Employees do have the option of attempting to annuitize payments. *See* Colleen E. Medill, *Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(k) Plans*, 81 N.C. L. REV. 901, 959 (2003) ("Annuity providers will price the traditional annuity at a higher cost to account for this systemic increased risk of longevity among purchasers of traditional annuities."); *see also* Zelinsky, *supra* note 9, at 463-64 (noting that the option is rarely used).

### 3. Cash Balance Plan

The cash balance plan is a hybrid defined benefit plan.<sup>44</sup> It arguably combines the best features of the defined benefit and contribution plans.<sup>45</sup>

Cash balance plans are like defined contribution plans because they create hypothetical accounts for employees based on their contributions at a specified rate of interest.<sup>46</sup> Cash balance plans are like defined benefit plans because the employer bears the investment risk and guarantees a particular benefit at retirement.<sup>47</sup> If the account earns more interest on the funds, the employer keeps the excess.<sup>48</sup> If the account earns less interest, the employee is still assured an amount at the specified interest rate.<sup>49</sup>

Cash balance plans provide a more uniform increase in benefits during continued employment and do not have the significant spike in benefits embodied in the final average formulas of the traditional defined benefit plans.<sup>50</sup> Rather than offering deferred annuity payments based on a salary and service formula,<sup>51</sup> cash balance plans typically distribute retirement benefits in one lump sum.<sup>52</sup>

Cash balance plans are good for employees because they offer universal coverage, portability of benefits, and little investment risk.<sup>53</sup> They are good for employers because they allow them to appeal to mobile workers while simultaneously retaining career workers by discouraging the early retirement that is typically offered with conventional plans.<sup>54</sup> While employers are still obligated to insure against default by the payment of

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44. Treas. Reg. §1.401(a)(4)-8(c)(3)(i)(2002); *see also* I.R.S. Notice 96-8 (Jan. 18, 1996) (stating cash balance plans are not defined contribution plans but defined benefit plans); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 817 (S.D. Ind. 2000) (reaching the same conclusion). Other hybrid plans include pension equity plans and life cycle pension plans. *See ALLEN ET AL.*, *supra* note 10, at 345-53.

45. *See Zelinsky*, *supra* note 9, at 502. For the legal framework governing cash balance plans, *see Zelinsky*, *supra* note 29, at 715-16.

46. *See* Treas. Reg. §1.401(a)(4)-8(c)(3)(i) (2002). The account is hypothetical because the company does not actually pay the funds in the employee account, but rather pools it with the funds of other participants. *See THE SOCIETY OF ACTUARIES, ACTUARIAL ASPECTS OF CASH BALANCE PLANS 1* (2000) (defining cash balance plans as a series of "notional" accounts for each participant).

47. *Zelinsky*, *supra* note 29, at 693.

48. *Id.* at 693-94.

49. *Id.*

50. *Clark & Schieber*, *supra* note 15, at 151; *see also Zelinsky*, *supra* note 29, at 722-23 (explaining that in annuity terms, "cash balance plans frontload rather than backload.").

51. *ALLEN ET AL.*, *supra* note 10, at 345-46.

52. Patrick J. Purcell, Cong. Research Serv., Order Code RL30496, *Pension Issues: Lump-Sum Distributions and Retirement Income Security*, at 6 (2003).

53. *Clark & Schieber*, *supra* note 15, at 171.

54. *See STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS 240-46* (1997); *see also Clark & Schieber*, *supra* note 15, at 171 (commenting on the low growth rate in the labor market which would make encouraging continued employment of workers more valuable).



premiums as under the conventional defined benefit plan, the lack of early retirement subsidies and more level benefit accruals make cash balance plans less costly.<sup>55</sup>

### B. *Employer Attitudes and Objectives*

Employer attitudes and objectives influence the decision to offer a pension plan and the form that plan will take.<sup>56</sup> Attitudes fall along a continuum from paternalistic notions to individualistic ideals.<sup>57</sup> The former paternalistic employer would be oriented toward protecting employees against economic insecurity.<sup>58</sup> Employers within this category would use traditional defined benefit plans and bear the risks of funding, investment, and longevity to ensure their employees had sufficient income throughout their retirement.<sup>59</sup> The latter individualistic employer would be oriented toward an approach that would have employees share in the cost of meeting their own economic security or would place the responsibility for financing and managing retirement accruals on employees as under a defined contribution plan.<sup>60</sup> The middle ground provided by cash balance plans would allow employers and employees to share in the risks of retirement. Employers would guarantee benefits, but allocate the amount in one lump sum.

Employer objectives can range from recruitment needs to cost imperatives.<sup>61</sup> They will vary in relative importance depending on the particular purposes served by the pension and the situation. Considerations for pension design would include the maturity of the company, anticipated growth, profit margins, capital requirements, predictability of profits, level of competition, and employee characteristics.<sup>62</sup> Ideally, employers would wish to meet employee needs and offer funding patterns consistent with objectives and capabilities.

If objectives included the recruitment and retention of workers, defined contribution or cash balance plans would be more suitable for younger, more mobile workers who appreciate portability.<sup>63</sup> Companies

55. Clark & Schieber, *supra* note 15, at 159.

56. Environmental influences on pension choice are discussed *infra* at Part IV.B.

57. ALLEN ET AL., *supra* note 10, at 28-32.

58. *Id.* at 28-29.

59. *Id.* at 29.

60. *Id.*

61. *Id.* at 32-43; *see also* Zelinsky, *supra* note 29, at 704-14 (discussing employee motives in abandoning defined benefit plans with final average formulas, for embracing defined contribution plans and choosing cash balance plans rather than defined contribution plans).

62. ALLEN ET AL., *supra* note 10, at 32-43.

63. Reece, *supra* note 39, at 78; *Retirement Security and Defined Benefit Pension*

seeking a more mature workforce may opt for the defined benefit format which, due to its back-loaded nature, offers greater benefits for older workers.<sup>64</sup>

With the cost of employee benefits overall accounting for one-third or more of payroll,<sup>65</sup> cost concerns are probably important in plan choice. Such concerns would include legal compliance, administrative ease, and contribution flexibility, which are typically maximized under the defined contribution plan.<sup>66</sup> While still subject to premiums under the PBGC and actuarial expenses, the cash balance variant also offers potentially more leeway in favorable accounting treatment than the traditional annuity-based defined benefit plan.<sup>67</sup> The lump sum distribution of retirement income also provides better control of future costs.<sup>68</sup>

#### IV. PRIVATE PENSION PROBLEM

More than forty-four million American workers participate in defined benefit plans.<sup>69</sup> They are the pensions of choice for seventy-five percent of companies listed on the S&P 500.<sup>70</sup> Pursuant to ERISA, defined benefit pension plans are insured by the PBGC.<sup>71</sup>

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*Plans: Hearing on Retirement Security and Defined Benefit Pension Plans Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 107th Cong. (2002) (testimony of Jonathan Skinner, Ph.D Economics) (citing employee appreciation of the portability of defined contribution plans); see also ALLEN ET AL., supra note 10, at 32-33 (advising that recruitment incentives should assess competitive standards in the industry or area that the company operates). But see Zelinsky, supra note 29, at 753 (expressing doubt that young workers favor cash balance plans due to their portability).*

64. Zelinsky, *supra* note 29, at 754. Like the defined contribution plan, cash balance plans' intergenerational impact is to favor younger workers. *Id.* at 754-55.

65. ALLEN ET AL., *supra* note 10, at 26 (noting an average of about thirty to as much as fifty percent).

66. ALLEN ET AL., *supra* note 10, at 31; *Retirement Security and Defined Benefit Pension Plans: Hearing on Retirement Security and Defined Benefit Pension Plans: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 107th Cong. (2002) (testimony of Ron Gebhardt, Senior Pension Fellow, American Academy of Actuaries) (citing federal regulation and complexity of administration as the primary reason for employer preference for defined contribution plans). Companies may also want to consider plan termination duties and legal liability, if any, before all accrued and vested benefits have been funded and its impact on net worth or the ability to raise capital. ALLEN ET AL., supra note 10, at 31.*

67. See Mary Williams Walsh, *Changes Discussed in Accounting for Some Pension Fund Obligations*, N.Y. TIMES, Sept. 25, 2003, at C1.

68. ALLEN ET AL., *supra* note 10, at 31.

69. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 3.

70. *Funding Challenge: Keeping Defined Benefit Pensions Plans Afloat: Hearing Before the S. Comm. On Finance, 108<sup>th</sup> Cong. 57 (2003) (citing statistics that include the cash balance form of defined benefit plan).*

71. See generally 29 U.S.C. §§ 1301-09 (establishing the PBGC); see also *Retirement Security: Picking Up the Enron Pieces: Hearing Before the S. Comm. on Finance (2002)*

The PBGC is a federal corporation that guarantees the payment of basic pension benefits either by becoming the trustee of under funded plans upon termination or by providing financial assistance through loans (which are typically not repaid) in the event a pension fund can no longer pay benefits when due at the guaranteed level (insolvency).<sup>72</sup> The corporation receives no taxpayer monies and its statutory duties are not backed by the full faith and credit of the United States Government.<sup>73</sup> Instead, PBGC funding for its underwriting and financial activity comes from insured plan sponsor premiums, employer under-funding liability payments, income earned on investments, and any assets taken over from failed plans.<sup>74</sup>

The PBGC publishes periodic reports that reflect its financial condition, as well as the condition of the 30,330 active plans it insures.<sup>75</sup> The latest information published in the PBGC's *2004 Annual Report*, *2005 Annual Report*, and *2005 Annual Performance and Accountability Report* demonstrates that many defined benefit plans are on the brink of economic disaster. The financial insecurity of these private sector pensions has placed the PBGC itself in a perilous position. The next two sections discuss the private pension dilemma of the PBGC and its insured corporate pensions followed by an explanation of its determinants.

#### A. *Failing Financial Health of Defined Benefit Plans and the PBGC*

In its latest public report, PBGC management expressed doubt that it can "satisfy the PBGC's long-term obligations to plan participants."<sup>76</sup> The Congressional Budget Office agrees. It has projected that the ten year losses to the PBGC could grow dramatically given the number of exposures the corporation has currently taken on in its own portfolio as well as the

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(prepared statement of Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corporation) ("PBGC is one of the three so-called 'ERISA agencies' with jurisdiction over private pension plans. The other two agencies are the Department of the Treasury (including the Internal Revenue Service) and the Department of Labor's Pension and Welfare Benefits Administration (PWBA)."). Certain defined benefit plans are exempt, such as those of professional service employers (physicians, lawyers), see 29 U.S.C. § 1321(b)(13), (c)(2), government units, see 29 U.S.C. § 1321(b)(2), or church based employers, see 29 U.S.C. § 1321(b)(3).

72. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 6, 10. As discussed *infra* at notes 82-85 and accompanying text, the PBGC separately operates single-employer and multiemployer pension programs. The PBGC's obligations begin upon plan termination for single-employer pensions and upon insolvency for the multiemployer pensions.

73. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 3.

74. *Id.* at 11; see also 29 U.S.C. §§ 1306-1307 (2000) (addressing premium rates).

75. See 29 U.S.C. § 1308 (2000).

76. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 12.

unfunded status of the plans it guarantees.<sup>77</sup>

In 2000, the PBGC had an almost ten billion dollar surplus.<sup>78</sup> By 2001, however, more than one hundred under-funded plans terminated.<sup>79</sup> The record-breaking trend of claims continued into 2005, bringing the cumulative total of trustee plans to 3,595 with more terminations expected in the future.<sup>80</sup> Indeed, considering plan sponsors whose credit ratings are well below investment grade or are otherwise in financial distress, the PBGC's future exposure to new terminations remains high at \$108 billion.<sup>81</sup> In 2003 and 2004, the exposure risk was \$82 billion and \$96 billion, respectively.<sup>82</sup>

The PBGC operates two separate insurance programs for defined benefit plans: single-employer and multi-employer plans.<sup>83</sup> A single-employer plan is a corporate pension sponsored by one employer for its employees.<sup>84</sup> A multi-employer plan is a pension plan sponsored by two or more employers in the same industry who have collective bargaining agreements with one or more unions.<sup>85</sup> These plans cover most workers in the unionized sectors of the economy that include the retail food, transportation, garment, and mining industries.<sup>86</sup>

The multi-employer program reported net income of \$25 million in 2004, but still posted a deficit of \$236 million.<sup>87</sup> In 2005, moreover, the program reported a net loss of \$99 million, with its deficit rising

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77. *Id.* at 5-6 (referencing September 2005 Congressional Budget Office Report).

78. David Cay Johnston, *At the Pension Agency, A Much Healthier Glow*, N.Y. TIMES, Jan. 21, 2001, at BU10.

79. At that time, some of the largest plans in PBGC history terminated. PENSION BENEFIT GUARANTY CORPORATION, 2001 ANNUAL REPORT 9 (Apr. 11, 2002) [hereinafter 2001 PBGC ANNUAL REPORT] (listing The Grand Union Company (17,000 participants), Outboard Marine Corporation (10,000 participants), Bradlees Stores (8,000 participants), Northwestern Steel and Wire Company (4,000 participants), and Laclede Steel Company (4,000 participants)).

80. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 2; *cf. id.* at 5 (noting record-breaking numbers of plan terminations from 2002 to 2004).

81. *Id.* at 4; 2005 PBGC ANNUAL REPORT, *supra* note 5, at 2.

82. 2005 PBGC Annual Report, *supra* note 5, at 13.

83. *Id.* at 10.

84. See 29 U.S.C. §1301(a)(15) (defining single employer plan as "any defined benefit plan . . . which is not a multiemployer plan"); see also *The Pension Under-funding Crisis: How Effective Have Reforms Been? Hearing Before the H. Comm. on Education and the Workforce*, 108th Cong. 4-85 (2003) (statements of Rep. Andrews from New Jersey, Chairman John A. Boehner, and Rep. Norwood from Georgia).

85. 29 U.S.C. §1301(a)(3). A multiemployer plan is defined as a plan "(A) to which more than one employer is required to contribute, (B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation." *Id.*

86. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 10.

87. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 7.

accordingly.<sup>88</sup> The single-employer program posted the largest net loss in program history of \$12.067 billion in 2004 and a deficit of \$23.305 billion.<sup>89</sup> On account of its multi-billion dollar deficit, the Government Accountability Office placed the PBGC's single employer insurance program on its list of "high risk" government programs.<sup>90</sup> The combined programs' underwriting and financial activities for 2004 resulted in a net loss for the fiscal year of \$12.042 billion and a deficit of \$23.541 billion.<sup>91</sup>

While ERISA mandates that plan sponsors keep funded ratios of ninety percent, firms with under-funded ratios of more than \$50 million had an average unfunded ratio of sixty-nine percent.<sup>92</sup> Collectively, these plan sponsors reported \$786.8 billion in assets to cover more than \$1.14 trillion in liabilities.<sup>93</sup> The companies reported a record shortfall of \$353.7 billion in 2005, a twenty-seven percent increase from the year before.<sup>94</sup> Aggregate under-funding of multi-employer plans is estimated to exceed \$200 billion.<sup>95</sup> Under-funding in single-employer plans exceeded \$450 billion as of September 20, 2005.<sup>96</sup>

88. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 12; 2005 PBGC ANNUAL REPORT, *supra* note 5, at 2.

89. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 16; *see also America's Pensions: The Next Savings and Loan Crisis? Hearing Before the S. Special Comm. On Aging*, 108th Cong. 51 (2003) (prepared statement of Steven A. Kandarian, Executive Director, PBGC) ("During FY 2002, PBGC's single-employer insurance program went from a surplus of \$7.7 billion to a deficit of \$3.6 billion—a loss of \$11.3 billion in just one year. The \$11.3 billion loss is more than five times larger than any previous one-year loss in the agency's 29-year history.").

90. PBGC Reform: Mending the Pension Safety Net: *Hearing Before the Subcomm. on Retirement Security and Aging of the S. Comm. on Health, Education, Labor, and Pensions*, 109th Cong. 3-12 (2005) (testimony of Bradley D. Belt, Executive Director); *see also* U.S. GEN. ACCOUNTING OFFICE, PENSION BENEFIT GUARANTY CORPORATION: SINGLE-EMPLOYER PENSION INSURANCE PROGRAM FACES SIGNIFICANT LONG-TERM RISKS 1 (2003) (concluding that the "long-term viability of the [single-employer] program is at risk"). Every year the GAO publishes a list of government agencies or programs that have high liabilities and are considered a "high risk."

91. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 14, 23. The PBGC's combined net position improved slightly in 2005 to \$(23.1) billion from \$(23.5) billion in 2004 due to strong investment returns and interest factors. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 4.

92. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 5. Section 4010 of ERISA mandates financial disclosure for only those companies with more than \$50 million in unfunded pension liabilities. *Id.* at 6.

93. *Id.* at 5.

94. *Id.* (showing 1,108 plans covering 15 million workers and retirees).

95. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 13 (illustrating an increase from \$150 billion in 2004). Multiemployer plan information is less current and complete than single-employer data.

96. *Id.* at 13. The financial position of single-employer plans remained constant from the year before, but had jumped from \$350 billion in 2003. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 18. The under-funding estimate is based on employers' reports to PBGC of

## B. *Environmental Influences on Private Pension Insecurity*

This section explains the present problem of private pension instability in light of the general economic decline, the demographics of an aging population, the increasing amount of labor regulation, and the changing structure of the labor market.

### 1. Economic Conditions

Economic conditions affect the financial markets and the rate of business failures. Both factors have negatively influenced the unfunded liabilities of corporate pensions and the rising deficit and duties of the PBGC.<sup>97</sup>

As described above, not only do many defined benefit pensions lack sufficient assets to cover anticipated liabilities, but their collective deficit measures in the hundreds of billions of dollars. The lack of sufficient assets in private pensions is attributed in part to the decline in the stock market beginning in 2000.<sup>98</sup>

The PBGC's single-employer program experienced investment losses of \$843 million in 2001.<sup>99</sup> Three years earlier in 1999, the multi-employer program posted investment losses of \$56 million.<sup>100</sup> Overall, the PBGC has fared better than its insured plans with assets outperforming liabilities in seven of the last ten years.<sup>101</sup> Nevertheless, PBGC management provides "no assurance that these results will continue."<sup>102</sup> They note that the growth in liabilities over the passage of time will not ordinarily be offset when the corporation's assets are significantly lower than its liabilities and when the yields are the same.<sup>103</sup>

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the market value of their assets and termination liability. *Id.*

97. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 7 ("The current massive underfunding of defined benefit pensions, compounded by the financial struggles of major industries that rely heavily on these pensions, has greatly increased the risk of loss for the pension insurance program."); *see also* 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 15.

98. Czarney, *supra* note 9, at 179 (detailing downward trend in the stock market since 2000). Even earlier, commentators sounded the alarm that a souring investment climate increased the "risk that thousands of American workers will not receive retirement benefits." *U.S. Pension Threat Continues to Grow*, NEWSDAY, Nov. 20, 1992, at 44; *cf.* Kaplan, *supra* note 9, at 53, 70-81 (explaining the problem of overinvestment in employer stock in defined contribution plans and proposals for reform).

99. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 48.

100. *Id.*

101. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 24 (noting asset gain of \$700 million for 2005); *see also id.* at 12 (refusing to project any investment income for 2006).

102. *Id.* at 8.

103. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 24.

In addition to market volatility, much of the PBGC's exploding deficit can be attributed to weaknesses in certain industries such as steel and air transportation.<sup>104</sup> These two industries account for almost three-quarters of past claims while representing fewer than five percent of the participants insured by the PBGC.<sup>105</sup> For example, when the Bethlehem Steel Corporation's plan terminated, the PBGC inherited \$3.7 billion of unfunded liabilities.<sup>106</sup> The plan was reportedly 97% funded as late as 1999, but only 45% funded by 2002.<sup>107</sup> The bankruptcy of LTV Corporation added \$1.6 billion in pension obligations with another \$1.1 billion from the insolvency of National Steel.<sup>108</sup>

The problems of the steel industry are symptomatic of what is happening in air transportation and other traditional industries.<sup>109</sup> The recent spike in oil prices can only contribute to the probability of pension termination upon the bankruptcy of several major carriers.<sup>110</sup> United Airlines and US Airways have sought protection in bankruptcy with the goal of shedding their defined benefit pension obligations.<sup>111</sup> Delta and Northwest have also filed bankruptcy and may seek to sacrifice pensions as well.<sup>112</sup> Even less known full-service airlines, like Legacy Airlines, have

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104. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 34; *see also* 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 13 (noting PBGC future exposure is concentrated in the sectors of manufacturing, transportation, communication, utilities, and services).

105. *See* 2004 PBGC ANNUAL REPORT, *supra* note 1, at 34-35; *see also* 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 14 (reporting that its losses are concentrated in a large number of claims from a relatively small number of terminated pension plans).

106. *The Pension Under-funding Crisis: How Effective Have Reforms Been? Hearing Before the H. Comm. on Education and The Workforce*, 108th Cong. 47-49 (2003) (testimony of J. Mark Iwry, Esq., Non-Resident Senior Fellow, The Brookings Institution).

107. *Id.*

108. Mary Williams Walsh, *\$8 Billion Surplus Withers at Agency Insuring Pensions*, N.Y. TIMES, Jan 25, 2003, at A1.

109. For a detailed discussion of the airline industry and their financial problems, see Amy Lassiter, Note, *Mayday, Mayday!: How the Current Bankruptcy Code Fails to Protect the Pensions of Employees*, 93 KY. L.J. 939, 946-49 (2004-2005). Economic indicators suggest that the automotive and communications industries are set to follow in the financial footsteps of the airlines. *See id.* at 950.

110. Amy Schatz & Susan Carey, *Airlines Take Their Problems to Congress*, WALL ST. J., June 3, 2004, at B2.

111. Susan Carey, *Airlines Fighting for Viability*, WALL ST. J., Nov. 8, 2004, at A5; *see also* Steven D. Jones, *Pensions Likely to Stay Dying Breed*, WALL ST. J., Aug. 29, 2006, at C3 (noting that Delta Air Lines and Northwest Airlines intend to impose freezes as part of their reorganization in bankruptcy). Trans World Airlines terminated its defined benefit pension plan covering 36,500 workers and retirees in 2001. *See* 2001 PBGC ANNUAL REPORT, *supra* note 79, at 9.

112. *See* David D. John, *Special Treatment for Airlines Flaws a Strong Senate Pension Bill*, *The Heritage Foundation*, Oct. 5, 2005, available at <http://heritage.org/Research/SocialSecurity/>

lost \$24.3 billion since 2000<sup>113</sup> with pension under-funding now estimated at \$31 billion.<sup>114</sup>

Collectively, the airline industry defined benefit pension liabilities exceed assets by \$31 billion.<sup>115</sup> In the past two years alone, airlines with over \$25 billion in additional pension under-funding filed for Chapter 11 bankruptcy.<sup>116</sup> According to the PBGC, these additional liabilities significantly increased “the risks facing the pension insurance program and the resources to respond to those risks.”<sup>117</sup>

## 2. Increased Life Expectancy

The changing demographics of the population have also played a role in the perilous financial situation of defined benefit plans and the entity that insures them.<sup>118</sup> The increase in life expectancy is both recent and dramatic. In one generation, life expectancy at birth rose from forty-seven years to about seventy-seven years.<sup>119</sup> One impact of increased longevity is its concomitant increase in the number of persons of retirement age, in absolute and relative terms.

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wm872.cfm (noting that both airlines filed bankruptcy the day before they were required to contribute \$200 million to their pension plans); see also Ellen Shulz, *Airlines in Trouble: Industry's Pension Maneuvers Raise Questions About the Law*, WALL ST. J., Sept. 14, 2004, at A17. Delta and Northwest had pension liabilities totaling \$6.4 and \$3.7 billion, respectively. See Deborah Solomon, David Rogers, & Evan Perez, *Congress Nears a Pension Bill, As Airlines Seem to Get Relief*, WALL ST. J., July 16, 2006, at A2, available at [http://www.uswestretiree.org/072006\\_2.htm](http://www.uswestretiree.org/072006_2.htm) (last visited Feb. 8, 2007).

113. U.S. GEN. ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: AIRLINE PLANS' UNDER-FUNDING ILLUSTRATES BROADER PROBLEMS WITH THE DEFINED BENEFIT PENSION SYSTEM 3 (2004) (statement of David M. Walker, Comptroller General of the United States) (discussing the fact that Legacy Airlines is a full service airline that does not offer low cost airfares and services). In contrast, low-cost airlines made \$1.3 billion in profits. *Id.*

114. *Id.*

115. Kimberly Blanton, *Pensions Grounded?: Airlines Could Be Latest Industry to Terminate Plans*, BOSTON GLOBE, Sept. 28, 2004, at F4; Caroline Daniel, *Airline Funds Plunge to Record \$31 Billion Shortfall*, FIN. TIMES, June 18, 2004, at 30 (totaling underfunded status of eleven major airlines).

116. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 57 note b (discussing fiscal years 2004 and 2005).

117. *Id.*; see also *id.* at 9 (noting operating expense increase of \$48 million due in part to the expenses associated with the recently terminated airline pension plans in 2005). The new pension reform legislation provides relief to airlines by extending the time in which they need to fund their pensions. See Pension Protection Act of 2006, *supra* note 11, Title IV.

118. Zelinsky, *supra* note 9, at 480; see also *id.* (noting demographic trends as negatively impacting defined benefit plans).

119. ALLEN ET AL., *supra* note 10, at 8 (“Since 1900, life expectancy at birth has increased from 47 years to approximately 76.9 years.”).



Growth among employees who are sixty-five years and older is growing almost four times faster than the total population.<sup>120</sup> In less than twenty-five years, the number of persons in this age category will double in size and represent about twenty percent of the total population compared to only about twelve percent today.<sup>121</sup> This means one in five Americans will be sixty-five years or older.<sup>122</sup>

Longer life expectancy causes defined benefit pension benefits to rise in one of two ways. Annuities paid by the defined benefit plans will be paid over a longer period of time or lump sum distributions will be larger because they are based on the life of the annuity.<sup>123</sup> Either way, rising benefits to employees translate into rising costs to their employer.

### 3. Retirement Regulation

The financial vulnerability of the PBGC and, accordingly, its insured pension plans is due in part to federal regulation. Despite the best of Congressional intentions in enacting ERISA to encourage and to support defined benefit pensions,<sup>124</sup> the statute and those that followed have had the opposite effect.

Since their peak at nearly 120,000 in 1977, defined benefit plans have dropped to one-quarter of that number today.<sup>125</sup> From 1986 to 2003, 97,000

120. U.S. CENSUS BUREAU, POPULATION DIVISION, STATE INTERIM POPULATION PROJECTIONS BY AGE AND SEX: 2004-2030 tbl.4 (2005), <http://www.census.gov/population/www/projections/projectionsagesex.html> (listing the change in the total population of the United States between 2000 and 2030 as 29.2% and the change in the population of those sixty-five years and older as 104.2%).

121. *Id.* at tbl.5 (providing the number of elderly persons sixty-five years and older for 2000 and projections for 2010 and 2030); *see also* Press Release, U.S. Census Bureau, Dramatic Changes in U.S. Aging Highlighted in New Census, NIH Report: Impact of Baby Boomers Anticipated (Mar. 9, 2006) (highlighting data from a National Institute on Aging report titled "65+ in the United States: 2005"), [http://www.census.gov/Press-Release/www/releases/archives/aging\\_population/006544.html](http://www.census.gov/Press-Release/www/releases/archives/aging_population/006544.html). *See generally* Joseph F. Quinn, *New Paths to Retirement*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 13-32 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000) (discussing trends in labor force participation and the age employees are choosing to retire).

122. Press Release, U.S. Census Bureau, *supra* note 121 (noting some seventy-two million people will be age sixty-five or more). Notably, the age distribution of the population age sixty-five and over is also changing with increased percentages at the upper end of the age scale. ALLEN ET AL., *supra* note 10, at 8.

123. ALLEN ET AL., *supra* note 10, at 8; *see also* Jones, *supra* note 111, at C3 (noting one reason for the recent company freezes of defined benefit plans is that retirees are living longer and raising the overall cost of pensions).

124. *See* ERISA § 1001 (discussing congressional findings regarding employee benefit plans); *see also* Hightower v. Texas Hosp. Ass'n, 65 F.3d 443, 447 (5th Cir. 1995) (explaining that ERISA was intended to encourage the establishment and growth of private pensions).

125. Compare PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DEPT. OF LABOR,

defined benefit plans with seven million participants were terminated.<sup>126</sup> In contrast, between 1984 and 1993, defined contribution plans grew nine hundred percent<sup>127</sup> and their numbers continue to increase.<sup>128</sup> Thirty years ago, there were approximately twice as many active participants in private defined benefit plans as in private defined contribution plans.<sup>129</sup> Now, pension experts estimate that “the situation is almost exactly reversed.”<sup>130</sup> In 1998, more than half (fifty-six percent) of workers with pensions participated solely in defined contribution plans.<sup>131</sup> Only fourteen percent participated solely in the defined contribution plan, with the remaining thirty percent participating in both defined benefit and contribution arrangements.<sup>132</sup> Defined contribution pension fund assets of approximately \$2.1 trillion also exceed the defined benefit pension fund assets of \$1.6 trillion.<sup>133</sup> In short, the defined contribution arrangement trumps the defined benefit in terms of the number of plans, participants, and assets.<sup>134</sup>

Analyzing these trends in the context of the regulatory environment, pension scholars have concluded that the increasingly complex legislation and its attendant costs to business have deterred the establishment of

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PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 1996, FORM 5500, ANNUAL REPORTS, tbl.E1 (1999-2000)[hereinafter PRIVATE PENSION PLAN BULLETIN], available at [http://www.dol.gov/ebsa/publications/bullet1996/table\\_e1.htm](http://www.dol.gov/ebsa/publications/bullet1996/table_e1.htm) (charting the number of defined benefit plans in 1997) with 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 1 (illustrating the number of defined benefit plans in 2005). In the nearly twenty year period from 1977 to 1993, defined benefit plans fell to half their number. See PRIVATE PENSION PLAN BULLETIN tbl.E1.

126. *Funding Challenge: Keeping Defined Benefit Pension Plans Afloat: Hearing Before the Senate Comm. On Fin.*, 108th Cong. 57 (2003) (prepared statement of Steven A. Kandarian, Executive Dir., PBGC) [hereinafter *Funding Challenge*].

127. LANGBEIN & WOLK, *supra* note 3, at 51.

128. *Funding Challenge*, *supra* note 126, at 37-38 (prepared statement of Henry Eickelberg, Staff Vice President, Gen. Dynamics, representative of the Am. Benefits Council).

129. Clark, Goodfellow, Schieber, & Warwick, *supra* note 39, at 95.

130. *Id.*

131. STAFF OF J. COMM. ON TAX'N, PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS (JCX-71-02) 32 (June 18, 2002); see also CONG. BUDGET OFFICE, UTILIZATION OF TAX INCENTIVES FOR RETIREMENT SAVING 4 (2003) (noting defined contribution plan participation at forty percent in 1997).

132. STAFF OF JOINT COMM. ON TAX'N, *supra* note 131, at 32.

133. See Arleen Jacobius, *Trillions and Trillions: Rollover Money to Eclipse DB and DC Plans' Assets: IRAs Will Be Beneficiaries of Huge Pool Created by Decades of Participation*, PENSIONS & INVESTMENTS, Mar. 31, 2003, at 3 (citing Federal Reserve data).

134. For analysis of the reasons for the shift to defined contribution plans and their impact on workers and firms, see generally ROBERT L. CLARK & ANN A. MCDERMED, THE CHOICE OF PENSION PLANS IN A CHANGING REGULATORY ENVIRONMENT (1990), RICHARD A. IPPOLITO, PENSION PLANS AND EMPLOYEE PERFORMANCE: EVIDENCE, ANALYSIS, AND POLICY (1997), and Alan L. Gustman & Thomas L. Steinmeier, *The Stampede Towards Defined Contribution Plans*, 31 INDUSTRIAL RELATIONS 361 (1992).

defined benefit plans and/or fostered their termination.<sup>135</sup> Edward Zelinsky, in fact, takes this thesis one step further. He posits that the passage of ERISA ushered in a new era that he calls the “defined contribution society.”<sup>136</sup> Zelinsky recounts the additional tax and labor legislation that solidified the paradigm shift from the defined benefit to defined contribution scenario by allowing the creation of individual savings accounts for retirement, health care, and even education.<sup>137</sup>

Albeit unintended, Zelinsky maintains that Congressional action meant to encourage defined benefit plans has not only pushed companies in the direction of less costly and risky defined contribution plans, but also has shaped societal expectations concerning how people think about retirement.<sup>138</sup> In a nutshell, Zelinsky asserts there has been a retirement revolution and that “Americans today experience and conceive of retirement savings in the form of individual accounts.”<sup>139</sup>

#### 4. Labor Market Structure

The changing structure of the labor market has also influenced the decline of the defined benefit plan and the resulting weakness of the PBGC. The structural transformation of the American economy, from unionized manufacturing companies to service sector operations and high technology enterprises, has altered the employment relationship in the United States and its attendant expectations.<sup>140</sup> Along with the role of regulation and the other environmental influences discussed above, these new objectives, attitudes, and experiences about work have encouraged the proliferation of the defined contribution plan or those hybrid plans similar to it.

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135. See, e.g., CLARK & MCDERMED, *supra* note 134, at 5 (Government mandated funding standards “have increased the cost of operating defined benefit plans[.]”); DAN M. MCGILL ET AL., *FUNDAMENTALS OF PRIVATE PENSIONS* 39-42 (7th ed. 1996) (discussing the impact of regulatory complexity on defined benefit plans); Kaplan, *supra* note 9, at 63 (discussing the factors that lead to greater “pension risk being borne by employees”).

136. Zelinsky, *supra* note 9, at 454; see also *id.* at 471-79 (explaining ERISA’s role in encouraging defined contribution pensions).

137. *Id.* at 482-508. Defined contribution plans have been called “individual account” plans because an employer pays into a separate employee account. See I BOREN & STEIN, *supra* note 30, at § 1:07.

138. Zelinsky, *supra* note 9, at 457-58 (“The shift from the defined benefit modality to the defined contribution one has altered in a fundamental manner the way in which Americans experience and think about retirement savings”).

139. Zelinsky, *supra* note 9, at 533.

140. See Jefferson, *supra* note 9, at 683 (“[T]he primary cause of the recent decline in participation in defined benefit plans was a structural shift in the economy rather than conscious decisions made by plan sponsors and employees.”).

Just as employment relations changed with industrialization and the demise of the craft union monopoly on skilled labor,<sup>141</sup> they changed once again as the economic output of the country shifted from manufacturing products to services.<sup>142</sup> In order to keep pace with growing competition from abroad and the speed of technological change, large manufacturing firms have been attempting to dismantle the scientific management structures that predominated during the twentieth century.<sup>143</sup> Companies are replacing limited positions of entry, hierarchical job ladders, and long-term employment with short-term employment, lateral mobility, general

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141. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 527 (2001) (“The ability of [] nineteenth-century skilled workers to control their wages and working conditions was a result of both their skills and their unions”).

142. Unlike the prior transformation which relied primarily on physical labor as workers moved from farms to factories, the new knowledge-based economy or “information age” has mental labor and creativity as the force of production. See THOMAS O. DAVENPORT, *HUMAN CAPITAL: WHAT IT IS AND WHY PEOPLE INVEST IT* 26 (1999) (discussing the “psychic contract” on which a loyalty-based commitment to employment is based); see also RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* ix (2002) (discussing the rise of “the Creative Class [which] derives its identity from its members’ roles as purveyors of creativity”). By the mid-twentieth century, more workers were employed in services industries than in goods and manufacturing. See STEPHEN A. HERZENBERG, JOHN A. ALIC, & HOWARD WIAL, *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* 2-3 (1998) (discussing development of the service industry). By the turn of the twenty-first century, service sector jobs had grown by 36 million to constitute roughly fifty percent of the gross national product. See Anthony Carnevale & Donna Desrochers, *Training in the Dilbert Economy*, 53 TRAINING & DEV. 32 (1999) (“In the United States, job opportunities shifted from traditional manufacturing such as steel and textiles to the services sector[.]”).

143. Stone, *supra* note 141, at 554-55, 561-62 (discussing the growth of “boundaryless careers” and citing Edward E. Lawler III who argues that scientific management and bureaucratic approaches are no longer appropriate) (citing Edward E. Lawler III, *From Job-Based to Competency-Based Organizations*, 15 J. ORGANIZATIONAL BEHAV. 3, 5-6 (1994)); see also Anne S. Miner & David F. Robinson, *Organizational and Population Level Learning as Engines for Career Transitions*, 15 J. ORGANIZATIONAL BEHAV. 345, 347 (1994) (commenting that recent research indicates that career paths have changed from employees moving up along fixed lattices on organizational flow-charts to organizational fluidity). New organizational behavior theories such as “competency-based organizations” and “total quality management” have been espoused to replace “scientific management” as companies emphasize organizational flexibility and promote product quality, speed, and adaptability to customer desires. See Stone, *supra* note 141, at 560-68 (discussing the terms of the “new psychological contract”). Corporations are also undergoing large scale downsizing and decentralization. See Charles Heckscher, *Defining the Post-Bureaucratic Type*, in *THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE* 14, 27 (Charles Heckscher & Anne Donnellon eds., 1994) (discussing the mass layoffs of management personnel in the 1980’s); Neil Anderson & René Schalk, *The Psychological Contract in Retrospect and Prospect*, 19 J. ORGANIZATIONAL BEHAV. 637, 638 (1998) (describing the psychological contract and the concept of an exchange relationship as its basis).

training, and skills development.<sup>144</sup> The altered recruitment and human resources practices reflect the fact that both employers and employees neither expect nor value cradle to grave employment.<sup>145</sup> As a result, while companies once offered defined benefit plans that favor long-term employment,<sup>146</sup> employee benefits packages now include pensions designed to accommodate the transient nature of employment.<sup>147</sup> The less costly and more mobile defined contribution plan is consistent with the twenty-first century workplace involving “just-in-time production, just-in-time product design, and just-in-time workers.”<sup>148</sup>

Consequently, there are legal, economic, and sociological reasons for the failing financial integrity of existing defined benefit plans and of the federal pension insurance program that supports them. These contributors to the private pension problem should be considered in its resolution.

## V. PROPOSALS FOR PRIVATE PENSION REFORM

This section attempts to answer the question of how best to secure the retirement benefits of employees participating in defined benefit pensions

144. See T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 14-16 (2005) (discussing labor market trends); see also PETER F. DRUCKER, *MANAGING IN A TIME OF GREAT CHANGE* 71 (1995) (“[T]here is no such thing as ‘lifetime employment’ anymore -- such as was the rule in big U.S. or European companies only a few years ago[.]”); ROSABETH MOSS KANTOR, *ON THE FRONTIERS OF MANAGEMENT* 190 (1997) (commenting on modern management theories in relationship to the “job-insecurity reality”).

145. Stone, *supra* note 141, at 519 (“[E]mployers and employees have a new understanding of their mutual obligations . . . in which expectations of job security and promotional opportunities have been replaced by expectations of employability, training, human capital development, and networking opportunities.”).

146. See *supra* Part IV.B.3, at 33; see also Stone, *supra* note 141, at 524, 533 (noting the longevity linked pay and benefits, including long term pension vesting, under the prior internal labor market structure). Companies began providing defined benefit pensions to their employees during the Industrial Revolution. ROBERT L. CLARK, LEE A. CRAIG & JACK W. WILSON, *A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES* 5 (2003). By the turn of the twentieth century, there were only twelve private pension plans. *Id.* The number of private pensions increased to 117 by 1916 with almost 200 by 1926. *Id.* The decades following the Second World War, however, marked the most rapid growth of defined benefit plans due to union demands. *Id.* at 687; ALLEN ET AL., *supra* note 10, at 12. For a detailed account of the economic, sociological, and historical evolution of pensions, see *id.* at 11-14.

147. Work practices have adjusted to ever changing production requirements by relying on temporary work and outsourcing. See Stone, *supra* note 141, at 539-49 (discussing the changing nature of employment and refuting the view by some economists that job tenure and job loss data did not evidence a decline in long-term employment); Zelinsky, *supra* note 9, at 481 (commenting that either perceived or actual employee mobility status is relevant in the sense that perception is reality).

148. Stone, *supra* note 141, at 549; see Clark & Schieber, *supra* note 15, at 170 (discussing the changes in retirement policies).

and to salvage at least some insurance benefits for those persons whose plans have or will terminate. The proposed solution has two parts: 1) legitimating company conversions from traditional to the cash balance kind of defined benefit plan and 2) reducing PBGC insurance benefits and/or delaying the age of eligibility. The first reform is consistent with the Pension Protection Act of 2006 and the second reform is contrary to it. Both reforms and their justifications are described below.

#### A. *Legalize Cash Balance Conversions*

Given the employment trends toward individual accounts and individual responsibility,<sup>149</sup> companies have been attempting to convert their defined benefit plans to hybrid cash balance plans.<sup>150</sup> The conversion, however, generally results in lower pension benefits for older workers<sup>151</sup> and arguably contravenes statutory rules against age discrimination.<sup>152</sup>

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149. See *supra* text of discussion within Parts IV.B.3, 4.

150. See *Hybrid Pension Plans: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 106th Cong. 5 (1999) (statement of Sen. Leahy) (listing IBM, AT&T, CitiGroup, Bell Atlantic, SBC Communications, CIGNA Corp., AETNA, Eastman Kodak, and CBS among the companies that have converted to cash balance plans.); see also Ellen E. Schultz & Theo Francis, *IBM Ruling Paves Way for Changes to Pensions*, WALL ST. J., Aug. 8, 2006, at A3 (discussing the implications of a recent ruling on the “roughly 400 companies with a total of more than 1,200 cash balance plans among them”).

151. KYLE N. BROWN ET AL., *THE UNFOLDING OF A PREDICTABLE SURPRISE: A COMPREHENSIVE ANALYSIS OF THE SHIFT FROM TRADITIONAL PENSIONS TO HYBRID PLANS* (2000); Clark & Schieber, *supra* note 15, at 150-51; see also Zelinsky, *supra* note 29, at 722 (“[A] stable amount contributed annually to a notional cash balance account yields progressively less in annuity terms as the participant gets older since there are fewer years for the contribution to accumulate investment interest.”). Whether a cash balance formula satisfies the age-discrimination tests will depend on the specific plan design. See Zelinsky, *supra* note 29, at 733 (noting the theoretical possibility of constructing a cash balance plan that does not violate prohibitions against age discrimination, but concluding that most companies today have not done so).

152. See Zelinsky, *supra* note 9, at 529 (noting that current cash balance plans “violate the rules for age discrimination . . .”); Zelinsky, *supra* note 29, at 725 (explaining that both ERISA and the ADEA prohibit the “rate of an employee’s benefit accrual” from being reduced because the employee reaches a certain age.); see also I.R.C. § 411(b)(1)(H)(i) (precluding defined benefit plans from reducing the “rate of an employee’s benefit accrual . . . because of the attainment of any age”); Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602, 603 (codified as amended at 29 U.S.C. § 623(i)(1)(A) (2000)) (stating that defined benefit plans that reduce the rate of an employee’s benefit accrual because of the attainment of a certain age constitute age discrimination); ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i) (2006) (stating that a defined benefit plan does not comply with ERISA if the “rate of an employee’s benefit accrual is reduced, because of the attainment of any age”); 4(i)(1)(A). The Pension Protection Act of 2006 protects cash balance conversions that occur after the effective date of the statute on August 17, 2006. *Supra* note 11, Title 7.

Several high profile cases of company conversions contributed to an extensive dialogue concerning cash balance plans.<sup>153</sup> The debate centers on the perceived unfairness to long-term employees who would have received higher benefits under the conventional defined benefit formula but for the conversion.<sup>154</sup> Easing company transitions from the traditional defined

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153. See, e.g., *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (11th Cir. 2000) (holding that Treasury Regulation § 1.311(a)-11 applies to an employer's calculation of lump sum distributions to employees with defined benefit plans and that the application of the Treasury Regulation is not contrary to ERISA); *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000) (holding that the pension plan violated the anti-forfeiture provisions of ERISA given that plaintiff received less than she would have had she not selected the lump sum payments). Courts are divided on the issue of whether cash balance plans violate age discrimination rules. See *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 10 (1st Cir. 2003) (noting in dicta that "it is by no means clear that the annuity method is the only permitted method in this context"). Compare *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006) (holding that employer's pension plan did not constitute age discrimination merely because younger workers have more time to work before retirement and therefore earn greater interest on their income), *Register v. PNC Fin. Svcs. Group, Inc.*, No. 04-CV-6097, 2005 WL 3120268, at \*4-\*8 (E.D. Pa. Nov. 21, 2005) (holding that the pension plan did not violate age discrimination provisions of ERISA because the retirement of younger workers would be greater than older workers due to the interest accruals), *Tootle v. ARINC, Inc.*, 222 F.R.D. 88 (D. Md. 2004) (dismissing plaintiff's claim that the conversion from a defined benefits plan to a cash balance plan constitute age discrimination under ERISA), and *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000) (holding that the conversion from a defined benefits plan to a cash balance plan did not constitute age discrimination under ERISA) with *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006) (refusing to dismiss plaintiff's claim that the conversion from a defined benefits plan to a cash balance plan constituted age discrimination under ERISA). The controversy stems from disagreement over whether to consider the annual benefit commencing at retirement age or whether to consider the accrued benefit balance in the individual account. See generally cases cited *supra*. The cash balance conversion rules found in the Pension Protection Act of 2006 are prospective only from the date of its enactment on August 17, 2006. Pension Protection Act of 2006, *supra* note 11, at Title VI.

Cash balance plans were the subject of a symposium at the Buffalo Law School in 2001. See, e.g., Edward A. Zelinsky, *Is Cross-Testing a Mistake? Cash Balance Plans, New Comparability Formulas, and the Incoherence of the Nondiscrimination Norm*, 49 BUFF. L. REV. 575 (2001) (explaining the controversy regarding the shift from defined benefits plans to cash balance plans); Edward A. Zelinsky, *Cross-Testing, Nondiscrimination, and New Comparability: A Rejoinder to Mr. Orszag and Professor Stein*, 49 BUFF. L. REV. 675 (2001) (arguing there is no significant differences between small employer defined benefit plans and comparability plans).

154. Zelinsky, *supra* note 29, at 754-55; Daniel J. Sennott, Note, *Finding the Balance in Cash Balance Pension Plans*, 2001 U. ILL. L. REV. 1059, 1067; see also Clark & Schieber, *supra* note 15, at 150 (suggesting that much of the negative publicity came from the popular press who relied extensively on selected interviews with workers who were adversely affected). The age discrimination debate over cash balance conversions also extends to the "wear-away" provisions where the participants previously earned benefit under the traditional formula is frozen until the new cash balance approach catches up with it. Zelinsky, *supra* note 29, at 728-29. Cash balance conversions are also challenged due to inadequacy of disclosure of the reduction in benefits. *Id.* at 730; see also *Register v. PNC*

benefit to the cash balance variant is good pension policy even at the expense (literally) of older workers. Accordingly, legislation should, and recently did, allow such transitions without age discrimination barriers.<sup>155</sup> Among other recent reform initiatives, the newly enacted Pension Protection Act of 2006 clarifies that cash balance conversions do not violate age discrimination rules.<sup>156</sup>

Recall that cash balance plans offer employees portability based on lump sum distributions and impose lesser penalties if they leave prior to

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Fin. Svcs. Group, Inc., No. 04-CV-6097, 2005 WL 3120268, at \*8 (E.D. Pa. Nov. 21, 2005) (considering the argument that the employer failed to disclose the cash balance formula's removal of the early retirement subsidy).

155. Zelinsky, *supra* note 9, at 529 (reaching the same conclusion and calling for a legislative amendment where age discrimination is tested on the basis of theoretical contributions and not annuity equivalents).

156. See Pension Protection Act of 2006, *supra* note 11, Title VII (stating that a pension plan does not violate age discrimination provisions if the employee's accrued benefit is greater than or equal to that of a younger worker who is similarly situated); see also Pension Security and Transparency Act of 2005, S. 1783, 109th Cong. § 601(a)(5) (2005) (passed House and Senate May 3, 2006) (stating that a cash balance plan will not violate age discrimination provisions simply because "it may reasonably be expected that the period over which interest credits will be made to a participant's accumulation account . . . is longer for a younger participant."); *Hybrid Plan Legislation Introduced*, 15 WATSON WYATT INSIDER 1, 6 (July 2005), available at [http://www.watsonwyatt.com/us/pubs/insider/pdfs/2005\\_07.pdf](http://www.watsonwyatt.com/us/pubs/insider/pdfs/2005_07.pdf) (cautioning that ambiguity in language concerning cash balance conversions may affect whether the bill will fulfill its objective). For other bills supportive of cash balance conversions, see Pension Protection Act, H.R. 2830, 109th Cong. (2005) (legalizing age differentials of accrued benefits when defined benefit plans are converted to cash balance plans and adopt the wear away method); Pension Protection and Portability Act, H.R. 2831, 109th Cong. (2005) (legalizing age differentials as well). For summaries of the latter two bills, see Bill Summary, *Pension Protection Act (H.R. 2830): Strengthening Retirement Security, Protecting Taxpayers by Fixing Outdated Worker Pension Laws*, 109th Cong. (2006), available at <http://edworkforce.house.gov/issues/109th/workforce/pension/ppasummarylong.htm> and Bill Summary, *Pension Preservation and Portability Act: Preserving the Portable Benefits of Cash Balance Pension Plans for American Workers*, House Education and Workforce Committee, 109th Cong. (2005), available at <http://edworkforce.house.gov/issues/109th/workforce/pension/ppasummary.htm>. The Department of Treasury has consistently stated that cash balance plans are not inherently age discriminatory. See *Reductions of Accruals and Allocations Because of the Attainment of Any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans*, 67 Fed. Reg. 76123 (proposed Dec. 11, 2002) (stating that a plan violates age discrimination provisions only if the rate at which benefits accrue is reduced because the employee attains a specific age); Department of Treasury, *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals* 82 (2005) (explaining the proposed Treasury Regulation (67 Fed. Reg. 76123) and stating that a cash balance plan does not discriminate on the basis of age as long as the credits paid to older workers are equal or greater than the credits paid to younger workers); Department of Treasury, *General Explanations of the Administration's Fiscal Year 2005 Revenue Proposals* 104 (2004) (coming to the same conclusion as the 2006 Revenue Proposals that cash balance plans are generally not age discriminatory).



reaching retirement eligibility.<sup>157</sup> Besides the ability to recruit and retain a more mobile workforce, these hybrid pensions are less costly to companies<sup>158</sup> and are perceived as more flexible in their administration.<sup>159</sup>

Moreover, in a study of seventy-seven employers who converted to hybrid plans between 1985 and 2000,<sup>160</sup> the conversion resulted in a more equitable allocation of accruals and benefits across workers who leave prior to retirement eligibility and those who stay longer.<sup>161</sup> It was also found that hybrid plans like the cash balance version provide more level accruals over employees' entire career as opposed to an accelerated growth in benefits late in their career.<sup>162</sup> Attempts have even been made to justify the cash balance format on the basis that their hypothetical account balances are easier for employees to understand than the defined benefit calculus.<sup>163</sup> In any event, it matters not so much *why* companies seek to convert to the cash balance format, but more so that they wish to do it.<sup>164</sup> Whatever their

157. See *supra* text of discussion within Part III.A.3; see also Robert G. Chambers, *APPWP's Testimony At Senate On 'Hybrid Pension Plans,'* TAX NOTES TODAY (Sept. 22, 1999) available at LEXIS 1999 TNT 183-21, ¶ 8) (commenting that the portability of hybrid pensions are better for women who have relatively short job tenures).

158. BROWN ET AL., *supra* note 151 (study reporting cost savings of anywhere from ten percent to as low as one percent); Clark & Schieber, *supra* note 15, at 159 (noting frequency at which employers put the cost savings from conversion back into the plan). IBM, for example, was facing rising pension costs and decreasing pension income because of the benefits being paid to middle aged employees. *Cooper v. IBM Pers. Pension Plan*, 274 F. Supp. 2d 1010, 1020 (S.D. Ill. 2003). Actuaries projected that IBM would produce savings of almost \$500 million by 2009. *Id.* (noting that savings were the result of future benefit reductions of up to 47% that would be earned by older IBM employees).

159. Because the required contribution is more certain, cash balance plans make it easier to forecast future liabilities as opposed to the conventional defined benefit plan. Jonathan Barry Forman & Amy Nixon, *Cash Balance Pension Plan Conversions*, 25 OKLA. CITY U.L. REV. 379, 401 (2000). The net effect (including the redistribution of benefits among plan participants) is similar to the defined contribution plan. The winners who are better off with the new plan are the younger workers and the losers who are worse off with the new plan are the senior workers with significant job tenure. Given these similarities, the argument against such conversions is incongruous in the absence of long-career employee expectations. Clark & Schieber, *supra* note 15, at 170 (noting the anomaly); accord Zelinsky, *supra* note 29.

160. The study was published by the Pension Research Council of The Wharton School. Forty-six of the employers established cash balance plans with the remainder adopting pension equity plans. Clark & Schieber, *supra* note 15, at 151. Although the study covered a fifteen-year period, most of the conversions occurred after 1997. *Id.*

161. *Id.* at 163.

162. *Id.* at 171.

163. See Arleen Jacobins, *Motorola Adds PEP to its Defined Benefit Plan*, 27 PENSIONS & INVESTMENTS No. 14, July 12, 1999, at 1 (citing Sheila Forsberg, Director of Global Retirement Benefits Strategy of Motorola, Inc.); see also Zelinsky, *supra* note 29, at 753 (questioning the proposition of better employee comprehensibility of cash balance plans).

164. Conversions to hybrid plans like the cash balance variation have taken place in primarily large companies in the industries of financial services, utilities, and telecommunications. Clark & Schieber, *supra* note 15, at 149. Among small to medium

objectives, failing to immunize employers from age discrimination claims for cash balance conversions may facilitate the termination of their defined benefit plans altogether.<sup>165</sup> In other words, something is better than nothing.

While it may be true that certain companies will continue to offer a pension for competitive reasons,<sup>166</sup> experience teaches it will likely take the form of a defined contribution plan.<sup>167</sup> Statistics confirm that the employer-based defined benefit plan is a dinosaur on the verge of distinction.<sup>168</sup> If there is a phoenix that rises from its ashes, the right legislative incentives pursuant to the new Pension Protection Act of 2006 can ensure that it will be in the cash balance format.<sup>169</sup> Furthermore, for those who

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companies, the conversion is largely in the health services industry. *Id.* All of these industries have gone through restructuring, which suggests that pension plans are part of their response to a changing business environment. *Id.*

165. In defense of their cash balance conversion, an IBM spokesperson noted this option in their testimony before the Senate. See J. Thomas Bouchard, *IBM Human Resources' Testimony At Senate Hearing On 'Hybrid Pension Plans,'* TAX NOTES TODAY (Sept. 22, 1999) available at LEXIS 1999 TNT 183-21, ¶ 19 (stating that “[f]ederal law . . . would have allowed IBM to terminate its pension plan, [and] cease benefit accruals . . .”); see also Colleen T. Congel, *Cash Balance Pension Plans Draw Both Praise, Criticism,* DAILY TAX REP. (BNA), Mar. 3, 1999, at J1. In addition to plan terminations, tens of thousands of workers in the last two years have had their pension plans frozen. Jeanne Sahadi, *Pension Reform: Boon for 401(k)s,* Aug. 17, 2006, [http://money.cnn.com/2006/08/17/pf/retirement/pension\\_signing/index.htm](http://money.cnn.com/2006/08/17/pf/retirement/pension_signing/index.htm).

166. Cf. Kaplan, *supra* note 9, at 70 (arguing that the risk of termination would be minimized despite additional proposed requirements for 401(k) plans for business reasons). Statistics show that the pension participation rates in the new information-based economy sectors of service (forty-five percent) and retail (thirty percent) are lower than manufacturing (sixty-eight percent). See Joint Comm. On Tax'n, Present Law and Background Relating to Employer-Sponsored Defined Benefit Plans 28 (JCX-71-02, 2002).

167. See Clark & Schieber, *supra* note 15, at 170; see also *supra* text of discussion within Part IV.B.3 (noting the growing number of defined contribution plans). Private employers favor defined benefit hybrid plans in part due to the tax penalty potentially incurred should they convert to a defined contribution plan. See generally 26 U.S.C. § 4980 (2002) (requiring an employer to pay income tax on overfunded plans and a fifty percent tax penalty).

168. Even after Congress passed the Pension Protection Act of 2006 to rehabilitate traditional pensions, companies like DuPont began freezing them and contributing more to their employees' 401(k) defined contribution accounts. Theo Francis, *DuPont Aims to Slash Pension Plan,* WALL ST. J., Aug. 29, 2006, at A2. Verizon Communications, Motorola, Hewlett-Packard and other companies have also announced freezes of their defined benefit pensions by stopping new enrollments and/or stopping the accrual of benefits to existing employees. Jones, *supra* note 111, at C3; see also *supra* text of discussion within Part IV.B.3.

169. *Hearing on Retirement Security and Defined Benefit Pension Plans Before the Subcomm. On Oversight of the H. Comm. On Ways and Means,* 107th Cong. 18 (2002) (testimony of Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corporation) (explaining that the only type of defined benefit plan that is increasing in number is the cash balance plan); Association of Private Pension and Welfare Plans,

understandably fear the proliferation of defined contribution plans where employees assume the risk (and reward) of their own investments,<sup>170</sup> it should be remembered that employers sponsoring cash balance defined benefit plans continue the benefit obligation. Viewed from this vantage, the cash balance compromise can be seen as the best of both worlds (defined benefit and contribution) or, alternatively, the lesser of two evils (cash balance versus defined contribution).<sup>171</sup>

Cash balance conversions without the existing age discrimination burdens additionally support ERISA's goal of securing defined benefit pension plans and continues the stream of much needed PBGC insurance premiums.<sup>172</sup> The shift to cash balance plans is also in line with Congressional policy toward Social Security which has raised the retirement age in which to receive benefits.<sup>173</sup> Because many traditional defined benefit plans have subsidized early retirement incentives discouraging continued employment, cash balance conversions without such incentives are supportive of the goal to encourage workers to extend their careers and preserve such entitlement programs.<sup>174</sup>

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*APPWP Release Opposing Cash Balance Conversion Plan Legislation*, TAX NOTES TODAY (Sept. 22, 1999) available at LEXIS 1999 TNT 183-32, ¶ 4 (“Cash balance and other hybrid defined benefit plans have been the one hopeful sign amid this ominous trend toward plan termination.”). Certainly, labor pressures in the remaining unionized, manufacturing companies that adhere to defined benefit arrangements may forestall a pension transformation. In this situation, however, legislative legitimization of the cash balance conversion would be irrelevant.

170. See Mark J. Warshawsky & John Ameriks, *How Prepared Are Americans for Retirement?*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 54 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000) (study concluding that a “majority of American households are predicted to fall short in funding retirement . . . .”); Susan J. Stabile, *Freedom to Choose Unwisely: Congress’ Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL’Y 361, 365 (2002) (questioning “Congress’ decision to immunize employers for participant decisions in 401(k) plans and its decision that participants are free to make whatever decisions they choose . . . .”); see also Olivia S. Mitchell, James F. Moore, & John W. Phillips, *Explaining Retirement Saving Shortfalls*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 139 (Olivia S. Mitchell, P. Brett Hammond, & Anna M. Rappaport eds., 2000) (“Much has been made in the popular press and among researchers of the failure of Americans to save adequately for their own retirement.”).

171. Zelinsky, *supra* note 9, at 502.

172. See Bill Summary, *Pension Preservation and Portability Act: Preserving the Portable Benefits of Cash Balance Pension Plans for American Workers*, House Education and Workforce Committee (June 9, 2005), at <http://budget.house.gov/republicans/educatesecbysec.pdf> (noting that cash balance plans account for twenty percent of the premium revenue paid by employers to the PBGC).

173. Clark & Schieber, *supra* note 15, at 169-71; see also Gustman, Mitchell, Samwick, & Steinmeier, *supra* note 25, at 309 (noting the interrelationship of social security policy and employment-based pensions).

174. Clark & Schieber, *supra* note 15, at 171.

Finally, prevailing employment norms do not prevent cash balance conversions despite the decline in benefits to certain older workers. Employees have neither a classic nor relational (or psychological) contract right to the continuation of the same pension coverage. As an initial matter, companies generally reserve the right to amend or even terminate their pension plans.<sup>175</sup> Thus, employees are entitled to only those benefits that have accrued.<sup>176</sup>

Even the potential legal implications of relational and psychological contract theory do not support employee expectations to the pension status quo.<sup>177</sup> Both notions are based on the idea that norms beyond the precise contract may develop during the contractual relationship.<sup>178</sup> Relational contract doctrine arose as a tool for understanding commercial contracts.<sup>179</sup> Psychological contract theory began in the management literature as a method for managing business relations.<sup>180</sup> These companion concepts have been particularly popular in analyzing labor relations and scholars have been pushing for recognition of these broader norms in all areas of employment law.<sup>181</sup> While relational norms have not yet been fully

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175. Employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [] plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); see also *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996) (holding that the *Curtiss-Wright* rule should be extended to pension plans, in addition to welfare benefit plans).

176. I.R.C. § 411(d)(6)(A) (1996); 29 U.S.C. § 1054(g)(1) (2002).

177. Some scholars have rejected the notion that theoretical relational or psychological norms should have practical use in wrongful discharge law. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984) (noting that there is a strong fairness argument in favor of freedom of contract); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1929 (1996) (arguing that employees underestimate their personal risk of job loss).

178. For a discussion of relational contract theory, see Ian R. Macneil, *Reflections on the Relational Theory*, in IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 291, 311-14 (David Campbell ed., 2001) and Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 823, 828 (2000) (symposium). For a discussion of psychological contract theory, see Stone, *supra* note 141, at 549-53.

179. The relational contract concept was popularized by Ian Macneil. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 151 (2005); see also David Campbell, *Ian Macneil and the Relational Theory of Contract*, in MACNEIL, *supra* note 178, at 3 (describing historical development of relational contract theory).

180. The term "psychological contract" arose in the early 1960s in the organizational behavior and human resources fields and received renewed interest in the late 1980s and 1990s due to corporate downsizing and restructuring. Bird, *supra* note 179, at 166; see also Stone, *supra* note 141, at 552 ("[T]he concept of a psychological contract has received considerable attention in the organizational behavior and human resource fields."), Marek V. Roehling, *The Origins and Early Development of the Psychological Contract Construct*, 3 J. MGMT. HIST. 204, 205 (1997) (tracing the origins of psychological contract theory to the political theory of social contract).

181. See generally Bird, *supra* note 179, at 166 (explaining the history and development

considered as part of pension practice and policy, it makes sense to include them.<sup>182</sup>

Katherine Stone, in particular, explained the terms of the new psychological contract in light of changing labor conditions in the twenty-first century.<sup>183</sup> The old psychological contract of the twentieth century encouraged worker attachment to the firm “with its promise of long-term job security, orderly promotional opportunities, longevity-linked pay and benefits, and long-term pension vesting . . . .”<sup>184</sup> Under the new psychological contract of the twenty-first century, employers no longer implicitly promise long-term employment or the prospect of promotion.<sup>185</sup> Rather, they offer general skills training, networking opportunities, and market-based pay and expect that employees will continue their careers elsewhere.<sup>186</sup> Employees also have no expectation of job security or, by extension, a pension plan consistent with that goal.<sup>187</sup>

Given these mutual expectations, the economic model that is often used to justify the prohibitions against age discrimination is inappropriate.<sup>188</sup> During the era of industrialization, labor economists developed a model of career wage paths to comprehend compensation levels over the course of an individual’s employment at a particular firm.<sup>189</sup>

of psychological contract theory and its growing popularity among employment law scholars); Stone, *supra* note 141, at 551 (noting the expansion in application for psychological contract theory from management employees to lower level employees, in addition to other areas of employment law).

182. Legal scholars have discussed the disadvantage of cash balance conversions to long-term employees in terms of their expectations. See Zelinsky, *supra* note 29, at 755 (remarking “that the very real anger generated by cash balance conversions is ultimately a matter of psychology . . .”).

183. Stone, *supra* note 141, at 548 (“Industrial sociologists, management consultants, organizational theorists, and corporate executives report with near unanimity that there is a fundamental change in the implicit psychological contract under which most Americans are now employed.”).

184. Stone, *supra* note 141, at 524.

185. The description of the overall labor market structure is a generalization that is, of course, subject to exceptions. See JOSEPH A. MACIARIELLO, *LASTING VALUE: LESSONS FROM A CENTURY OF AGILITY AT LINCOLN ELECTRIC* 12, 46, 52 (2000) (discussing explicit long term employment policy although employees pay their own benefits like health care).

186. Stone, *supra* note 141, at 524.

187. Stone, *supra* note 141, at 519, 524. Stone’s analysis supports Zelinsky’s thesis of a society that has become accustomed to individual responsibility in individual accounts. Zelinsky’s model of individual responsibility reflected in defined contribution retirement accounts enabled by legislation is part of a broader set of new expectations and experiences influenced by workplace dynamics in moving from industrialization to an information age.

188. See Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211, 223 (2002) (explaining that under the previous economic model, employers have an incentive “opportunistically terminate the worker who has achieved a higher salary . . .”).

189. Stone, *supra* note 141, at 535. The model was developed to explain the institution of mandatory retirement. Bird, *supra* note 179, at 155 n.38 (citing Edward P. Lazear, *Why*

The model divides employee wages into phases, with the earlier phases being where employees are paid less than the amount of their marginal product and/or less than the value of their opportunity wage.<sup>190</sup> In the final “recoupment stage,” however, employees receive more pay than their marginal product value and opportunity wage.<sup>191</sup> The theory explaining the model relies on reciprocal implicit promises that employees are willing to defer compensation in their earlier career in exchange for security and higher pay in their later career.<sup>192</sup>

The injustice of terminating an employee or arguably, reducing their retirement benefits during the last phase where the employee was to reap the benefits of long term employment and deferred compensation, is self-evident. As discussed *supra* Part IV.B.4, however, the present economy is dominated by an entirely different labor market structure. At the core of relational contract theory is the idea that employment norms change over time and adjust to new conditions.<sup>193</sup> The conditions marking the new millennium began their transition thirty years ago.<sup>194</sup> Studies now confirm that there is neither the expectation of lifetime employment nor presumably the retirement benefits that accompany it.<sup>195</sup>

Surely, one explanation for an offer of longevity-based future benefits found in defined benefit plans could be in acceptance of a reduction in cash wages.<sup>196</sup> Nonetheless, the mere fact that a company sponsors a defined

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*Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261, 1265 (1979)).

190. Stone, *supra* note 141, at 535-37.

191. *Id.* at 537.

192. See GARY BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* 29-30 (2d ed. 1975) (noting how students defer pay while in school to learn a trade in order to earn greater salaries later on); RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 170-71 (6th ed. 1997); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 249 (1985) (explaining the difference between employment and commercial contracts); see also Albert DeRoode, *Pensions as Wages*, 3 AM. ECON. REV. 287, 287 (June 1913) (expressing deferred wage theory of pensions).

193. See, e.g., Speidel, *supra* note 178, at 828 (noting how relational contracts extend over long periods of time and continually change and adapt under new circumstances).

194. Stone, *supra* note 141, at 539. This is the same time period that companies began shifting to defined benefit plans and that Congress enacted ERISA. Clark & Schieber, *supra* note 15, at 149.

195. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 127-28, 134 (1997) (study showing that most employees expect reductions in workforce due to economic pressure); see also Bird, *supra* note 179, at 194 (explaining that relational norms do not dictate lifetime employment and that “[l]ayoffs are an expected though unwelcome fact of modern economic life.”).

196. See Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate*, 58 WASH. & LEE L. REV. 1369, 1395-97 (2001) (asserting that company

benefit plan does not necessarily imply that the pension was offered as a form of wage replacement. Some employers pay the prevailing cash wage rate for a particular industry *and* provide pension benefits.<sup>197</sup> The deferred wage concept additionally ignores the possibility that an employer may be willing to accept a lower profit margin to provide a pension plan to employees.<sup>198</sup>

If a company converting to a cash balance pension plan is truly operating under the vintage internal labor market structure evidenced in the model, then management should certainly consider compensating those employees in the last stage of their career.<sup>199</sup> Literature is replete with the pitfalls of failing to account for legitimate psychological expectations in the employment relationship.<sup>200</sup> To the extent employers do not choose to accommodate older employees and such employees do not otherwise find sanctuary under the common law of contract,<sup>201</sup> legislation should

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terminations of all defined benefit plans for older workers *ipso facto* deprive them of their implicit bargain for higher retirement benefits at the end of their employment). Firm loyalty could arguably be considered a quid pro quo for retirement benefits as well.

197. ALLEN ET AL., *supra* note 10, at 17.

198. *Id.*

199. Because relational contracts change over time, Speidel, *supra* note 178, at 828, it is doubtful that even those employees hired before the mass layoffs and restructuring during the 1980s have psychological bonds with their employer for long-term employment and longevity-linked pension plans.

200. Bird, *supra* note 179, at 168-69 (discussing data showing that employees lose trust and commitment to the firm); Stone, *supra* note 141, at 550-51 (citing studies indicating the effects of failing to meet the expectations of a psychological contract); *see also Id.* at 597 (citing strikes in the early twentieth century as examples of breach of psychological contract of piece rate workers).

201. *See Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980) (concerning a wrongful discharge case using relational contract language); David J. Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 652 (1996) (noting thirty-eight out of fifty states accept implied contract claims); *see also* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will* 92 MICH. L. REV. 8 (1993) (positing that wrongful discharge rulings implicitly follow an employee life-cycle doctrine that gives more protection to late-career workers who are paid disproportionately well compared to their productivity and who hold strong interests in their post-retirement benefits). Federal preemption under ERISA, however, may prove problematic. *Compare Totton v. New York Life Ins. Co.*, 685 F. Supp. 27 (D. Conn. 1987) (holding that a claim by discharged employees that because of breach of employment agreements they suffered loss of pension benefits that would have accrued had they not been terminated were not preempted by ERISA), *and O'Hollaren v. Marine Cooks & Stewards Union*, 730 P.2d 616 (Or. Ct. App. 1986) (holding that an employee's cause of action against employer for alleged breach of contract regarding deferred compensation of wages was not preempted by ERISA), *with Rollo v. Maxicare of Louisiana, Inc.*, 695 F. Supp. 245 (E.D. La. 1988) (holding that ERISA preempted employee's state law claims for breach of contract, tortious interference, intentional infliction of emotional distress, and unfair and deceptive trade practices), *and Ferrante v. International Salt Co.*, 687 F. Supp. 309 (E.D. Mich. 1988) (finding state-law claims of misrepresentation and breach of employment contract preempted by ERISA). *See*

nevertheless *not* provide a means for legal recourse. While there were bills pending to the contrary,<sup>202</sup> the Pension Protection Act of 2006 reasonably leaves it to business (management) for resolution.<sup>203</sup>

Perhaps a less *laissez faire* ideology will pervade pension reform efforts in the future. While the regulatory state has inevitably experienced expansions and contractions throughout history, the primary function of government has been to keep the machinery of American capitalism running smoothly and productively.<sup>204</sup> For those who distrust economic ambition no less deeply than ambitious government,<sup>205</sup> allowing cash balance conversions without age discrimination liability under the new statute can be seen as a compromise of sorts to keep companies competitive and their workers within the defined benefit system.

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*also* Psychiatric Inst. of Wash., D.C., Inc. v. Conn. Gen. Life Ins. Co., 780 F. Supp. 24 (D.D.C. 1992) (allowing federal common-law cause of action of promissory estoppel against insurers who had provided an oral interpretation of ambiguous ERISA plan provisions); Miller v. Coastal Corp., 978 F.2d 622 (10th Cir. 1992) (explaining circumstances of estoppel application).

202. *Contra* Pension Benefits Protection Act of 2005, S. 1304, 109th Cong. § 3 (2005) (introduced June 23, 2005) (equalizing benefits for older workers due to cash balance conversions and offering the a choice at retirement between old and new plans); National Employee Savings and Trust Equity Guarantee Act of 2005, S. 219, 109th Cong. (2005) (introduced Jan. 31, 2005) (protecting older employees when there is a cash balance conversion and prohibiting wear away methods); STAFF OF S. BUDGET COMM., 108th Cong., PRESIDENT BUSH'S 2005 BUDGET 23 (2004), *available at* <http://www.senate.gov/~budget/republican/analysis/2004/Instant/2005Instant.pdf>.

203. Pension Protection Act of 2006, *supra* note 11, Title VII; *see also* Zelinsky, *supra* note 9, at 530 (suggesting that companies provide workers a choice between the two plans or provide them extra credits to account for the difference). Notably, the redistribution of benefits among plan participants due to a conversion is not entirely different from the effect of changes to Social Security in 1977 that reduced annual benefits such that different workers obtained different benefits based on their birth years. Clark & Schieber, *supra* note 15, at 173 n.14.

204. From a public policy perspective, pensions may also be justified on efficiency grounds. ALLEN ET AL., *supra* note 10, at 13-14. If pensions are provided in lieu of increased wages, known as the deferred wage concept, there is no added compensation cost to the employer. *Id.* at 14. If pension contributions are paid along with the prevailing wage and the employer cannot or chooses not to absorb the cost as part of a lower profit margin, then the extra compensation costs may potentially be passed on to the public in the form of higher prices. *Id.* Consequently, the cost of economic security of the aged is spread over time to numerous persons. *Id.* (discussing the rationale that providing pensions allows retirees to have greater consumption levels which in turn assist the economy).

205. *See* Zelinsky, *supra* note 9, at 523 (doubting whether government paternalism is needed or will likely succeed in the private pension system) (citing Jeffrey J. Rachlinski, *The Uncertain Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003) and William G. Gales, *Comment, in* BEHAVIORAL DIMENSIONS OF RETIREMENT ECONOMICS 116, 116-20 (Henry J. Aaron ed., 1999)).



### B. Reduce PBCG Insurance Benefits

Because ERISA requires the PBGC to be self-financing, past regulatory initiatives have sought to remedy the corporation's failing financial health by increasing its funding.<sup>206</sup> For instance, ERISA was amended to require companies to reimburse the PBGC for benefits paid to plan participants.<sup>207</sup> Legal reforms have also increased employer premiums.<sup>208</sup> Yet none of these reforms have remedied the problem.<sup>209</sup> In fact, after studying the PBGC's desperate financial situation, the Congressional Budget Office reported in 2005 that an increase in premiums will not work.<sup>210</sup> The CBO concluded that the "levels of loss . . . would likely exceed the ability of the other private defined benefit plan sponsors in the system to cover those losses through higher premiums . . ." <sup>211</sup> The foregoing conclusion notwithstanding, the Pension Security & Transparency Act of 2005 recently passed by both the House and the Senate proposed increasing premiums once again.<sup>212</sup> However, that bill was superseded by the Pension Protection Act of 2006 which limits such increases to those companies who underfund their pension plans.<sup>213</sup>

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206. A recent proposal also attempts to increase the amount of the PBGC funding by suggesting that the corporation be given a superpriority claim in bankruptcy proceedings. Lassiter, *supra* note 109, at 953-54; accord Jill L. Uylaki, *Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Corporation?*, 6 ELDER L.J. 77 (1998).

207. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987). The PBGC's entitlement to collection is largely a right without a remedy. See 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 6, 10 (discussing the need for legislative reform in order to protect PBGC's future finances and noting that certain PBGC loans are typically not repaid).

208. See Pension Protection Act of 1987, enacted as Title IX of the Omnibus Budget & Reconciliation Act of 1987, Public L. No. 100-203 (imposing a penalty if information is not filed in a timely manner with the corporation); see also *PBGC v. LTV Corp.*, 496 U.S. 633, 638 (1990) ("Congress repeatedly has been forced to increase the annual premiums [of employers.]").

209. See discussion *supra* Part IV.

210. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 6 (citing September 2005 Congressional Budget Office Report).

211. *Id.*

212. For single-employer pensions, the annual flat-rate premiums are \$19 per participant and annual variable rate premiums are paid by underfunded plans at a rate of \$9 per \$1000 of under-funding. *Id.* at 8. For multiemployer pensions, the annual flat-rate premiums drops to \$2.60 per participant with no variable rate premiums. *Id.* at 11. Under the Pension Security and Transparency Act of 2005, flat rate premiums would have been raised for single-employer plans from \$19 to \$30 per participant. Pension Security and Transparency Act of 2005, *supra* note 156, § 401(a). Other bills also offered the same solution of raising premiums. National Employee Savings and Trust Equity Guarantee Act of 2005, S. 219, 109th Cong. (2005).

213. The prior law exempted companies from the variable rate premiums if they satisfied

Rather than increasing the input, Congress should consider decreasing the output by reducing PBGC benefit levels and/or raising the age of retirement. Under the current statutory regime, the benefits scheduled to be paid are not actuarially sustainable even with the prospect of increasing premium rates. Accordingly, akin to proposals to solve the problem of Social Security,<sup>214</sup> Congress should attempt to restore actuarial balance by reducing the PBGC's benefit commitments.<sup>215</sup>

The PBGC was never meant to fully replace pension benefits. It provides mandatory insurance of catastrophic risk and guarantees the payment of basic pension benefits when underfunded plans terminate. The maximum guarantee is set by law for the year in which the plan ended.<sup>216</sup> For pension benefits beginning in 2006, for instance, the PBGC pays a monthly amount up to \$3,971.59 (\$47,659.08 annually) for participants at age 65 and less for pensions beginning earlier.<sup>217</sup> With catastrophes unfortunately becoming a more frequent occurrence,<sup>218</sup> a reduction in benefits will allow at least some income to reach the greatest number of

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the full-funding limit of ninety percent. Legislative Notice, U.S. Senate Republican Policy Committee, *supra* note 11, at 10. The Pension Protection Act of 2006 eliminates the full-funding exemption so that all underfunded plans are required to pay variable rate premiums. Pension Protection Act of 2006, *supra* note 11, tit. IV; *see also* Press Release, White House, *Fact Sheet: The Pension Protection Act of 2006* (Aug. 17, 2006), <http://www.whitehouse.gov/news/releases/2006/08/20060817.html> (explaining that the legislation requires "companies that under-fund their pension plans to pay additional premiums").

214. *See, e.g.*, HENRY J. AARON & JOHN B. SHOVEN, *SHOULD THE UNITED STATES PRIVATIZE SOCIAL SECURITY?* 89-94 (Benjamin M. Friedman ed.) (1999) (suggesting reforms designed to bring social security outlays and receipts into balance); PETER A. DIAMOND & PETER R. ORSZAG, *SAVING SOCIAL SECURITY: A BALANCED APPROACH* 23, 83, 87-88, 93, 167-70, 183 (2004) (suggesting reforms designed to bring social security outlays and receipts into balance).

215. *See Zelinsky, supra* note 9, at 531 (commenting that delaying benefits for Social Security is economically equivalent to starting a lower level of benefits earlier).

216. *See* 29 U.S.C. §§ 1322-1322b (2006) (describing the circumstances under which the corporation will guarantee payment of nonforfeitable benefits). For computing the maximum guaranteed benefits, *see* 29 C.F.R. §§ 4022.22-4022.23 (describing maximum benefit computation).

217. Pension Benefit Guarantee Corporation, Maximum Monthly Guarantee Tables, <http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html>.

218. *See, e.g.*, Press Release, Pension Benefit Guarantee Corporation, PBGC Assumes Pension Plan of Plymouth Rubber Co. (July 19, 2006), <http://www.pbgc.gov/media/news-archive/2006/pr06-59.html> (confirming PBGC's assumption of Plymouth Rubber's pension obligations); Press Release, Pension Benefit Guarantee Corporation, PBGC Protects Pensions at Victory Memorial Hospital (July 5, 2006), <http://www.pbgc.gov/media/news-archive/2006/pr06-54.html> (confirming PBGC's assumption of Victory Memorial Hospital's pension obligations); Press Release, Pension Benefit Guarantee Corporation, PBGC Assumes Pension Plan of Pittsburgh Brewing Co. (May 23, 2006), <http://www.pbgc.gov/media/news-archive/2006/pr06-48.html> (confirming PBGC's assumption of Pittsburgh Brewing Co.'s pension obligations).

persons for the longest period of time. Indeed, the PBGC is already responsible for the pensions of more than one million people with additional new participants expected in the near future.<sup>219</sup> Moreover, sustainability would be heightened without altering the cost-benefit calculation for companies or risking even more plan terminations as compared with the proposal to raise premiums.<sup>220</sup>

The reality is that the PBGC is unlikely to miraculously transcend the demise to which destiny has consigned it in this defined contribution age. Unless the government enters the business of fixing broken companies, it is doubtful whether even Congress can succeed in putting Humpty-Dumpty together again. Nevertheless, despite the notable decline of defined benefit plans, they are still a significant part of the private pension system.<sup>221</sup> Lowering the PBGC's projected benefit payments and/or raising the retirement age prolongs the defined benefit insurance program in line with ERISA and in light of the business environment. It should therefore be considered as part of the retirement reform agenda.

Admittedly, be it law or politics, policy arguments in support of law reform depend upon predictions and value judgments. Policy analysis is complicated by the fact that laws are often meant to serve multiple values and purposes which represent a compromise among their competing aims.<sup>222</sup> As here, the solution involves a resolution of the conflicts and an ordering of the values through a balancing process.<sup>223</sup>

219. During 2004, the PBGC paid over \$3 billion in benefits to more than 518,000 people. 2004 PBGC ANNUAL REPORT, *supra* note 1, at 4. It added almost 150,000 new participants, well above historical norms. *Id.* at 5. "At year-end, PBGC was responsible for the pensions of more than [one] million people, including 443,000 who will begin to receive benefits from PBGC when they retire in the future and 100,000 who are receiving or will receive benefits through PBGC's financial assistance to multiemployer plans." *Id.* at 4. By 2005, it added nearly 300,000 more beneficiaries. 2005 PBGC PERFORMANCE & ACCOUNTABILITY REPORT, *supra* note 5, at 3.

220. See Zelinsky, *supra* note 9, at 477 (indicating the premium payment structure of the PBGC generates costs associated with defined benefit plans that do not exist with other pension plans); see also *id.* at 525-26 (advising Congress to "do no harm").

221. They are sponsored by large companies of long-standing, including many companies covered by collective bargaining agreements. See discussion *supra* notes 68-69 and accompanying text. It was union demands that, ironically, shifted the risk of pension fund failure to the government in the first place. Wooten, *supra* note 3, at 738 (discussing how union strategy attempted to alter the basic relationships among benefit levels, cost, and risk). With that government safety net now at risk, union bargaining strategy may perhaps shift to other alternatives like increased funding levels that reduce the necessity of government assistance.

222. See, e.g., WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 135 (2002) (explaining how policy goals can take the form of targeted societal goals, instrumental concerns, or abstract values).

223. *Id.* at 68; see also J.C. Smith, *Machine Intelligence and Legal Reasoning*, 73 CHI-KENT L. REV. 277, 326-27 (1998) (discussing the need to order competing values hierarchically).

Do the reforms encourage the continuation of defined benefit plans? Should they? If so, how should they accomplish that goal? By encouraging cash balance conversions and removing existing discrimination deterrents? If the law does not facilitate such conversions, will companies truly cancel their conventional defined benefit plans? If the law does account for such conversions, should it require companies to compensate career employees who will receive lower benefits? If it does mandate compensation, will this defeat the purpose of encouraging defined benefit plans? Will companies compensate older employees anyway? If no compensation is paid, what is the likelihood that the reduction in benefits will be unfair or unjust?

Also, can legal reform save the PBGC? Should it? If so, how? By increasing insurance premiums or by decreasing benefits? Will increasing premiums thwart the purpose of encouraging defined benefit plans? To what extent? Will decreasing benefits really assist in the long-term sustainability of the PBGC? At what point should that goal be altered by consideration of the social welfare? Is it better to give more people less or less people more? And so on. There are simply no easy answers to the complex questions involved in retirement reform. Whatever laws (such as the new Pension Protection Act) prevail in future printing of the Code books, the current crisis in corporate America and its widespread social implications is sure to keep pension funding at the heart of political discourse.

## VI. CONCLUSION

Employers voluntarily provide pension benefits to ninety million American workers over and above their social security contributions.<sup>224</sup> They have become the primary vehicle of safeguarding against the economic risk of old age.<sup>225</sup> With the Pension Protection Act of 2006 recently enacted into law, it is a good time to talk about retirement.

Like business managers, politicians must wager their salvation based upon imperfect knowledge. Perhaps the fixation on individual accounts

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224. Reece, *supra* note 39, at 140 (citing Chamber of Commerce News Release).

225. See ALLEN ET AL., *supra* note 10, at 7 (“For the first time in several years, limits on allowable pension contributions were actually increased. The tremendous increases in disposable income over the last 50 years previously had not resulted in any increase in the proportion of personal savings. It will be interesting to see whether the expansion of pension contribution limits . . . has a sustained impact on personal savings.”); Reece, *supra* note 39, at 70 (providing statistics showing retirees depend on pensions and savings over Social Security); see also John B. Shoven, *Return on Investment: Pensions are How American Saves*, ASSOC. OF PRIVATE PENSION AND WELFARE PLANS (Sept. 1995) (noting that pensions grew faster than total wealth during the 1980s and concluding that “pension are how American saves”).

and individual accountability is a “national fantasy”<sup>226</sup> or the “ticking demographic time bomb”<sup>227</sup> some prophesy. With employees covered by defined contribution plans only now beginning to retire, it is simply too soon to tell.<sup>228</sup> What we do know is that the “overregulation” of defined benefit plans pursuant to ERISA and its progeny has had the unintended effect of facilitating their failure and the financial distress of the PBGC.<sup>229</sup>

Legalizing the hybrid cash balance conversions as well as decreasing PBGC insurance benefits and/or increasing the age of eligibility attempt to avoid additional pension costs and complexities. They are also consistent with the changed conditions in the world of work. The proposed legal reforms further the explicit goal of ERISA in encouraging defined benefit plans and the implicit role of government in a free enterprise economy. While not all crises call for legislative correction, the foregoing policies in support of changed company pension practices are a reasonable means of retaining retirement security in an increasingly insecure world.

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226. Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 247 (2004).

227. Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 3 (2000).

228. Kaplan, *supra* note 9, at 59.

229. See generally Zelinsky, *supra* note 9; see also discussion *supra* Part IV.B.3. At least some manufacturing firms that offer traditional defined benefit pensions are optimistic that they will benefit from the overhaul of funding rules in the new legislation. See Scott Suttell, *Pension Gains*, Crain's Cleveland Bus. on the Web (Aug. 18, 2006), <http://www.crainscleveland.com/apps/pbcs.dll/article?AID=200660818009>. Other companies are skeptical. Because of the new pension accounting rules that require a deduction of plan shortfalls from net worth, the risk to stock prices and loan covenants may be too great to continue their defined benefit plans. Jones, *supra* note 111, at C3.