

COMPARISON OF BILLS DESIGNED TO INFLUENCE CASH BALANCE PLAN CONVERSIONS

[Note: Many of the Proposals Outlined Below Potentially Apply to All Defined Benefit Plan Amendments, Not Just Cash Balance Conversions.]

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
General Changes	<p><i>Disclosure:</i> Amendments to defined benefit plans (and certain defined contribution plans) that result in a significant reduction in the rate of future benefit accruals must generally be disclosed under ERISA.</p> <p><i>Anti-Cutback Rules:</i> Under the Internal Revenue Code (“Code”) and ERISA, no plan amendment can reduce an employee’s accrued benefits with respect to the employee’s service as of the amendment date.</p> <p><i>Age Discrimination:</i> The Code generally prohibits a defined benefit plan from ceasing or reducing the rate of an employee’s benefit accrual due to the attainment of age. The preamble to previous Treasury Department guidance affecting cash balance plans states that certain interest adjustments under cash balance plans do not constitute impermissible age discrimination under the Code.</p>	<p><i>Enhanced Disclosure:</i> An enhanced new disclosure requirement would be added to the Code and ERISA with respect to certain significant reductions in the rate of future benefit accruals for larger plans. The Conference Agreement states that the conferees intend for the Treasury Department to issue regulations providing even more stringent disclosure requirements for significant changes in how accrued benefits are determined or that require participants to choose between benefit formulas.</p>	<p><i>Enhanced Disclosure:</i> Existing ERISA section 204(h) disclosure requirements would be modified for all plans currently subject to that regime. In addition, for large plans the disclosure requirements would be expanded substantially. Similar notice requirements would be added to the Code with respect to any significant reduction in the rate of future benefit accruals.</p>	<p>Harkin</p> <p><i>Elimination of Wear-Away Benefits:</i> The bill would expand the definition of accrued benefits protected from plan amendments by expanding the scope of the ERISA anti-cutback rule to prohibit so-called wear-away benefits.</p> <p>Sanders/Wellstone</p> <p>Four changes are proposed:</p> <p><i>Elimination of Wear-Away Benefits:</i> Same as Harkin, except also adds prohibition to the Code.</p> <p><i>Enhanced Disclosure:</i> New disclosure requirements would be added to ERISA section 204(h) and to the Code with respect to any significant reduction in the rate of future benefit accruals in large plans.</p> <p><i>Choice:</i> Any plan amendments resulting in a significant benefit reduction for any participant could be subject to a sizable excise tax under the Code unless each participant has the right to make an election to continue to accrue benefits under the prior plan terms. Plan amendments converting to a cash balance plan would be prohibited under ERISA unless participants are given a similar choice.</p> <p><i>Age Discrimination Issues:</i> The bill would direct the Secretary of the Treasury to enforce the Code’s existing anti-age discrimination provisions without regard to previous Treasury statements that cash balance conversions do not result in impermissible age discrimination. A safe harbor from this prohibition would be created where the defined benefit plan allows all fully-vested participants the choice between continuing benefit accruals under the pre- or post-amendment benefit accrual formula.</p>

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
Elimination of Wear Away Benefits	<p>The rules of Code section 411(d)(6) and ERISA section 204 (the “anti-cutback rules”) ensure that plan amendments may not reduce benefits that have already accrued. Those rules do not, however, prohibit changes in the benefit formula on a going-forward basis, although some state constitutions and state laws (and a few private sector plans) expressly protect future accruals.</p> <p>Historically, many employers have dealt with the transition from one plan formula to another by implementing a “wear away” of the previous benefit. In essence, the participant’s benefit is defined as the <u>greater of</u> the benefit accrued under the old plan formula (for years up to the effective date of the amendment) (the “protected benefit”) or the benefit payable under the new plan formula (taking into account some or all years of service). This approach (which has been blessed by the IRS on numerous occasions) is called a “wear-away” because the protected benefit under the old formula wears away as the benefits under the new benefit formula grow. Because it tends to be longer service employees who may be the most affected by the wear-away benefit, some argue that this approach discriminates against older participants.</p>	No change.	No change.	<p>Harkin</p> <p>The ERISA anti-cutback rule would be modified to provide that a plan amendment adopted by a large defined benefit plan would be treated as reducing accrued benefits, unless the benefit was at least equal to <u>the sum of</u> (1) the accrued benefit for years of service before the effective date of the amendment (determined under the terms of the plan as in effect immediately before the effective date), <u>plus</u> (2) the accrued benefit determined under the formula applicable to benefit accruals under the current plan as applied to years of service after such effective date. Certain early retirement subsidies would be expressly protected.</p> <p>Sanders/Wellstone</p> <p>Same as Harkin, except also adds change to the Code anti-cutback rule. [H.R. 1300, previously introduced by Senator Harkin, would have included a comparable Code amendment. S. 1600 was introduced in order to ensure that the bill was directed to the Senate Health, Education, Labor and Pension (HELP) Committee. The Harkin bill is cosponsored by Senator Jeffords (R-VT), chairman of the HELP Committee.]</p>

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
Choice to Remain Under Old Plan Formula	No provision.	No change.	No Change.	<p>Sanders/ Wellstone</p> <p>Plan amendments resulting in a significant benefit reduction for any participant could be subject to a sizable excise tax under the Code unless each participant with fully-vested accrued benefits has the right to make an election to continue to accrue benefits under the prior plan terms. The excise tax would be 50% of the “excess pension assets” in the plan as of the effective date of the plan amendment. For this purpose, “excess pension assets” are generally defined as assets in excess of 125% of current plan liabilities. Generally, the employer would be liable for the excise tax.</p> <p>ERISA would also be amended to prohibit any plan amendment converting to a cash balance plan unless each participant (whether or not fully vested) is given a choice to continue to accrue benefits under the prior plan terms.</p>
Age Discrimination	Section 411(b)(1)(H) of the Code generally prohibits a defined benefit plan from ceasing or reducing the rate of an employee’s benefit accrual due to the attainment of age. The 1991 preamble to Treasury nondiscrimination regulations states that certain interest adjustments under cash balance plans do not constitute impermissible age discrimination under the Code section 411(b)(1)(H).	No change.	The Administration has announced a joint IRS, Treasury, Labor Department, and EEOC review of issues surrounding cash balance plan conversions.	<p>Sanders/ Wellstone</p> <p>The Secretary of the Treasury is directed to enforce the anti-age discrimination requirements of Code section 411(d)(1)(H) by applying that subsection “without regard to the portion of the preamble to [the 1991 regulations] . . . as such preamble is and has been since its adoption without the force of law.”</p> <p>Thus, if enacted, it would appear that any amendment under a cash balance plan that results in the rate of benefit accrual of any participant being reduced as the participant ages would be retroactively in violation of that Code section. The bill does provide a safe harbor from this prohibition for plans that (1) provide the notice otherwise required by the bill, and (2) provide each participant (whether or not fully vested) with a choice between continuing benefit accruals under the pre-amendment formula or applying the post-amendment formula. [Note: because the bill applies only to large defined benefit plans, no safe harbor appears to exist for smaller cash balance</p>

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
<p>Disclosure Changes: Information Required to Be Included in All Notices</p>	<p>The same level of disclosure is required with respect to all significant reductions in future benefit accruals. The ERISA section 204(h) notice must be provided in writing and set forth the plan amendment and its effective date.</p> <p>Alternatively, the notice may contain a summary of the amendment, rather than the text of the amendment, if the summary is written in a manner calculated to be understood by the average plan participant and contains the effective date. The summary need not explain how the individual benefit of each participant or alternate payee will be affected by the amendment.</p> <p>The notice is not required to be provided in any specific format. Any format may be used, provided that it clearly conveys the required information.</p>	<p>Plan administrators of large plans would be required to provide a written notice with respect to a significant reduction in the rate of future benefit accrual. The notice would be required to be written in a manner that can be understood by the average plan participant and provide sufficient information (as determined in Treasury regulations) to allow the individual to understand the effect of the plan amendment.</p> <p>In addition, the Conference Agreement provides that the conferees intend that Treasury regulations will require the notice to describe how the amendment generally will affect different classes of employees.</p>	<p>The amended ERISA section 204(h) (and the new Code section) requirements would apply to all amendments resulting in a significant reduction in future benefit accruals. It would no longer be sufficient to provide a copy of the plan amendment. Rather, a summary of the important terms of the amendment (written in a manner calculated to be understood by the average plan participant) must be provided, including:</p> <ul style="list-style-type: none"> (1) the effective date of the amendment; (2) an explicit statement that the amendment is expected to significantly reduce the rate of future benefit accruals; (3) a description of the class or classes of participants to whom the amendment applies; and (4) a description of how the amendment significantly reduces the rate of future benefit accruals. 	<p>plans.]</p> <p>Sanders/Wellstone</p> <p>No changes in basic disclosure requirements.</p>
<p>Additional Disclosure and Other Requirements</p>		<p>The Conference Agreement states that the Treasury regulations will require additional disclosure if the amendment would: (1) provide for a significant change in the manner in which accrued benefits are determined under the plan, or (2) require an affected participant (or alternate payee) to choose between two or more benefit formulae.</p> <p>This additional disclosure would be required to include:</p> <ul style="list-style-type: none"> (1) The individual's accrued benefit (and if the amendment would add the option of an immediate lump sum distribution, the present value of the accrued benefit) as of the amendment effective date, determined under the terms of the plan in effect immediately before the effective date; (2) the individual's accrued benefit as of the amendment 	<p><i>Enhanced Disclosure:</i> Additional enhanced disclosure of all significant benefit reductions would be required if the plan has 100 or more plan participants. The enhanced disclosure must include:</p> <ul style="list-style-type: none"> (1) A description of the plan's benefit formulas (including formulas for determining early retirement benefits) before and after the amendment; (2) An explanation of the effect of the amendment on affected participants; (3) An explanation of the circumstances (if any) under which the amendment is reasonably expected to result in a wearing away of benefit accruals; and 	<p>Sanders/Wellstone</p> <p>Additional enhanced disclosure of all significant benefit reductions would be required if the plan has 100 or more plan participants. The notice to plan participants must be written in a manner calculated to be understood by the average plan participant, and must include:</p> <ul style="list-style-type: none"> (1) the plan amendment and its effective date; (2) a comparison, determined both with and without regard to the plan amendment, of (a) the accrued benefit and the present value of the accrued benefit as of the effective date and (b) the projected accrued benefit and the projected present value of the accrued benefit as of the date which is 3 years, 5 years, and 10 years from the

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
		<p>effective date, determined under the terms of the plan in effect on the amendment effective date and without regard to any minimum accrued benefit that may not be decreased by the amendment (sec. 411(d)(6)), and</p> <p>(3) either (a) sufficient information (as defined in Treasury regulations) for the individual to compute his or her projected accrued benefit or to acquire information necessary to compute such projected accrued benefit, or (b) a determination of the individual's projected accrued benefit with a disclosure of the assumptions (which must be reasonable in the aggregate) used by the plan in determining the projected accrued benefit.</p> <p>For purposes of this additional notice, an individual's accrued benefit and projected accrued benefit would be computed as if the accrued benefit were in the form of a single life annuity at normal retirement age, taking into account any early retirement subsidy.</p> <p>With respect to a plan amendment that would require a participant or alternate payee to choose between 2 or more benefit formulas, the Secretary of the Treasury would be authorized to require additional information and different timing of notices.</p> <p>The Conference Agreement provides examples which elaborate on these requirements.</p>	<p>(4) Illustrative examples that show the adverse effects of the plan amendment, based on benefits in the form of a life annuity and on actuarial assumptions certified by an enrolled actuary as reasonable when applied to all plan participants. The illustrations must be prepared in accordance with regulations prescribed by the Secretary of the Treasury, which will require that the examples (a) fairly reflect different categories of similarly-affected participants; (b) show a comparison of benefits for each such category at appropriate future dates; and (c) illustrate any wearing-away effect of the amendment;</p> <p>(5) Notice that certain additional general information is available upon request. This information, when combined with information personal to the individual, must be sufficient to make estimates similar to those in the illustrative examples. The information must be provided within 15 days of a timely request (i.e., one made within 12 months of receipt of notice or the amendment's effective date). The plan sponsor would not be required to make available the participant's personal information;</p> <p>(6) Notice that individual benefit statements are available upon request.</p> <p><i>Individualized Benefit Statements:</i> Personalized individual benefit statements would have to be available upon request and would generally be similar to the enhanced advance notice, but would be based on data specific to the individual. The participant could request that the individual benefit statement include a projection to one date specified by the participant in addition to the dates used in the examples. The individualized notice would have to be provided within 30 days after the date of the request (or, if later, 90 days after the effective date of the plan amendment).</p> <p>The Secretary of the Treasury would be authorized to provide alternative methods of compliance with the enhanced disclosure requirements.</p>	<p>effective date and as of the normal retirement age;</p> <p>(3) a table of annuity factors used to calculate benefits under the plan, presented in the form provided in Code section 72 and the regulations thereunder.</p> <p>The bill would require (under both the Code and ERISA) that in the case of any plan amendment significantly reducing the rate of future benefit accrual of one or more participants, each participant who has a fully-vested right to his or her accrued benefit must be provided with (1) a written notice (as otherwise required by the bill), and (2) an election to continue to accrue benefits under the pre-amendment benefit accrual formula.</p>

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
Parties Required to Receive Notice	A written notice must be provided to all participants and alternate payees, other than those whose rate of future benefit accrual is reasonably expected not to be reduced by the amendment. In addition, written notice must be provided to each employee organization that represents a participant who is entitled to receive a notice.	The required notice must be provided only to participants and alternate payees (and employee organizations representing them) who may reasonably expect to be affected by the amendment.	Notices must be provided only to participants and alternate payees (and employee organizations representing them) whose future benefit accruals under the plan may reasonably be expected to be reduced by the plan amendment. In addition, any person entitled to receive notice may designate in writing an alternate recipient of the required notice.	Sanders/Wellstone The bill would seem to require that notice be provided to <i>all</i> participants and alternate payees (and employee organizations representing them), not just those whose benefit accruals are reasonably expected to be reduced by the plan amendment. Any person entitled to receive notice may designate in writing an alternate recipient of the required notice.
Timing of Notice	Disclosure must be made after the adoption of the plan amendment and not less than 15 days prior to the effective date of the plan amendment.	Except to the extent provided in Treasury regulations, the notice would have to be provided within a reasonable time before the effective date of the plan amendment. Thus, the notice could be provided before or after the amendment was actually adopted if the amendment is not materially modified after notice and before adoption. The Conference Agreement states that Treasury regulations will require that notice be provided within 30 days before the effective date of the plan amendment. With respect to a plan amendment that makes a significant change in the manner in which accrued benefits are determined under the plan, or that requires participants to make a choice among benefit formulas, the legislative history provides that the intent is for the regulations to require the plan administrator to provide additional notice to affected parties within 6 months after the effective date of the plan amendment	The disclosure would be required at least 45 days before the effective date of the amendment. Thus, the notice could be provided before or after the amendment was actually adopted if the amendment is not materially modified after notice and before adoption. The Secretary of the Treasury would be authorized to reduce the 45-day period to 15 days where compliance is unduly burdensome.	Sanders/Wellstone The disclosure would be required at least 45 days before the effective date of the amendment. The notice could be provided before the amendment is adopted if the amendment is not materially modified after notice and before adoption. All elections to continue benefit accruals under the pre-amendment formula must be offered within a reasonable time from the effective date of the plan amendment.
Employers Affected	ERISA section 204(h) applies to all defined benefit plans and certain defined contribution plans that are subject to minimum funding standards.	The changes would apply to defined benefit plans (and certain defined contribution plans that are subject to minimum funding standards) with 100 or more participants. No special exception is provided for multiemployer plans. However, the provisions would not apply to a governmental or church plan with respect to which an election under Code section 410(d) has not been made.	The expanded ERISA section 204(h) basic disclosure requirements would apply to all defined benefit plans (and certain defined contribution plans subject to minimum funding standards). The enhanced disclosure requirements would apply only to those plans with 100 or more participants.	Harkin The new requirements would apply to plans with 100 or more participants. Sanders/Wellstone The new requirements would apply to defined benefit plans with 100 or more participants who had accrued a benefit under the plan (whether or not vested) as of the last day of the plan year preceding the plan year in which the amendment becomes effective.

Item	Current Law	H.R. 2488 (as passed by Congress on August 5, 1999, and vetoed on September 23, 1999)	Clinton Administration Proposal (as reflected in H.R. 3047 (Matsui) & S. 1708 (Moynihan))	S. 1600 (Harkin) & H.R. 2902 (Sanders) and S. 1640 (Wellstone) (collectively Sanders/Wellstone)
Consequences of Failure to Provide Notice, Etc.	<p>Failure to provide the required notice under ERISA section 204(h) will result in the plan amendment being ineffective.</p> <p>In general, an amendment that significantly reduces the rate of future benefit accrual is effective with respect to any participants (and alternate payees) who are provided a proper notice, provided that the plan administrator made a good faith effort to comply with the requirements of ERISA section 204(h).</p> <p>In addition, an amendment may apply to all affected persons -- even those who are entitled to a notice but do not receive one -- if the plan administrator made a good faith effort to comply and failed to provide a notice to no more than a <i>de minimis</i> percentage of participants and alternate payees.</p>	<p>Failure to provide the new Code-required notice would result in an excise tax equal to \$100 per day per omitted participant and alternate payee during the noncompliance period. The noncompliance period would run from the date the failure occurred to the date the failure is corrected.</p> <p>For failures due to reasonable cause and not to willful neglect, the total excise tax during a taxable year would be capped at \$500,000.</p> <p>The excise tax would apply to the employer in the case of single employer plans, and to the plan in the case of multiemployer plans.</p> <p>The Secretary of the Treasury would be authorized to waive the excise tax where its application would be excessive relative to the failure involved.</p>	<p>An egregious failure to provide this notice would result in application of the plan amendment as if it entitled all participants to the greater of their benefits determined before or after the plan amendment. An egregious failure is defined to include an intentional failure, and a failure to provide most individuals with most of the information they are entitled to receive.</p> <p>Failure to provide the new Code-required notice (including the basic notice applicable to plans with under 100 participants) would result in an excise tax equal to \$100 per day per omitted individual during the noncompliance period (<i>e.g.</i>, the period from the date the failure occurred to the date the failure is corrected). For failures due to reasonable cause and not to willful neglect, the total excise tax during a taxable year would be capped at \$500,000 (\$1,000,000 for plans with 100 or more participants). Generally, the employer would be liable for the excise tax.</p> <p>The Secretary of the Treasury would be authorized to waive the excise tax where its application would be excessive relative to the failure involved.</p> <p>Willful failure to provide the individual notice required upon request could result in criminal sanctions.</p>	<p>Harkin</p> <p>There is no specific penalty for failing the substantive definition of “reducing accrued benefits” for purposes of ERISA section 204(g). However, participants and/or the Department of Labor could file suit for enforcement.</p> <p>Sanders/Wellstone</p> <p>Failure to provide the required notice would result in plan disqualification. In addition, the plan amendment would be ineffective.</p> <p>For failure to give fully vested participants a choice between old and new benefit formulas, an excise tax would apply equal to 50% of the amount of the “excess pension assets” in the plan. For this purpose, “excess pension assets” are generally defined as assets in excess of 125% of current plan liabilities. The excise tax would apply to the employer in the case of single employer plans, and to the plan in the case of multiemployer plans.</p>
Effective Dates		<p>The proposal would apply to plan amendments taking effect on or after the date of enactment, with a delayed effective date for plans maintained pursuant to a collective bargaining agreement.</p> <p>Until Treasury regulations are published, a plan would be treated as meeting the requirements of the section if it makes a good faith effort to comply.</p> <p>The period to provide notice would not end before the date that is 3 months after the date of enactment.</p>	<p>The changes would apply to plan amendments taking effect after the date of enactment. The changes would not apply to any plan amendment for which there was a written notice before July 12, 1999, which was reasonably expected to notify substantially all of the plan participants. Until the Secretary of the Treasury issues regulations, a plan will be treated as meeting the new requirements if it makes a good faith effort to comply. For amendments that become effective within four months after enactment, a transition rule would allow longer time frames for providing the enhanced notice and individual benefit statements.</p>	<p>Harkin</p> <p>The changes would apply to plan amendments taking effect after June 29, 1999.</p> <p>Sanders/Wellstone</p> <p>The changes would apply to plan amendments taking effect after December 31, 1998. However, any notice required to be provided by the bill would be effective if provided within 3 months after the bill is enacted.</p>