

TO: The Pension Coalition
FROM: Rosina B. Barker, Ivins, Phillips & Barker
DATE: August 4, 2005
RE: Existing age discrimination exposure — effect of NESTEG

This memo answers a technical question about the effect of NESTEG on hybrid plans' existing exposure to age discrimination claims, for benefits earned before July 26, 2005.

Background

All hybrid plans are at risk for claims under *Cooper v. The IBM Personal Pension Plan*,¹ which essentially held that ***all hybrid plans are inherently age-discriminatory***. *Cooper* risk affects all hybrid plans without regard to what conversion technique was used. An appeal of *Cooper* is expected to be decided by the Seventh Circuit in late 2006. Other cases addressing the same issue have been decided in favor of the plan, or are pending in Federal district court.

The National Employee Savings and Trust Equity Guarantee Act of 2005 (NESTEG), approved by the Senate Finance Committee, July 26, 2005, overrides *Cooper* and provides that hybrid plans are not inherently age discriminatory, effective July 26, 2005. Legislative history will state that “no inference” is intended for hybrid plans under current law. NESTEG also imposes design restrictions on hybrid plan conversions (generally effective July 26, 2005), and 3-year vesting for hybrid plans, effective after December 31, 2006.²

Issue

Is a hybrid plan's existing *Cooper* risk for benefits earned before July 26, 2005, helped, hurt or unaffected by the bill? Is the answer any different if the plan's past conversion just happened to meet NESTEG (or the plan was established without conversion)?

Answer

For benefits earned before July 26, 2005, the bill ***at best does not help and might possibly hurt*** a plan's existing *Cooper* risk. Exactly the ***same answer applies*** for plans whose past conversion happened to meet the bill's new requirements — being a “good” conversion under NESTEG has no effect, positive or negative, on a plan's existing *Cooper* risk.

Bottom line: To the extent a company is worried about existing *Cooper* risk, the bill is worse than no legislation. It is at best unhelpful, and conceivably harmful, for existing *Cooper* risk. It halts the growth of future risk — which the sponsor can already do at any time by freezing the formula. In return, the bill imposes 3-year vesting, restricts employers' ability to modify future pension benefits not yet earned, and opens the door for further such restrictions.

¹ 247 F.Supp. 2d. 1010 (S.D. Ill. 2003).

² JCX-57-05, July 26, 2005, at pp. 6-7.

Discussion

Bill fails to address existing *Cooper* risk. The courts will almost certainly find that the bill does not clarify current law as to existing benefits, but rather applies only to new benefits earned after July 26, 2005. The effective date by itself implies this prospective-only effect.³ In addition, the “no inference” clause in legislative history virtually guarantees prospective application: nearly all courts to consider the issue have found that a no-inference clause is conclusive proof that a legislative amendment amends the law as in effect only *after* the amendment’s statutory effective date.⁴ A no-inference clause is read to show prospective effect even when other parts of legislative history state that the amendment is intended to clarify the law and resolve conflicting authorities.⁵ A tiny handful of cases have gone the other way, reading a no-inference clause to mean that Congress intended to clarify old law retroactively and to override a statutory effective date, but these are the very rare exception.⁶

³ *Lockheed Corp. v. Spink*, 517 U.S. 882, 896 (1996); *See, e.g., American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 993 (10th Cir. 1991); *Squire v. Students Book Corp.*, 191 F.2d 1018, 1020 (9th Cir. 1951); *O’Gilvie v. United States*, 519 U.S. 79, 89-90 (1996).

⁴ We found 26 tax and pension cases that expressly addressed this question and concluded that, when law is amended with a specified effective date, a no-inference clause in legislative history means that the amendment applies only after its statutory effective date; old, unamended law applies before that date. *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 993 (10th Cir. 1991) (REA’s amendment of anti-cutback rule applied only after effective date, despite statement in Ways & Means Committee Report that REA intended to “clarify” law and reconcile conflicting case law, in part because no-inference clause in Senate Finance Committee Report trumped “clarifying” clause in Ways and Means Report); *O’Gilvie v. United States*, 519 U.S. 79, 89-90 (1996) (*dictum*: prospective effective in 1996 SBJPA amendment of I.R.C. § 104(a)(2), plus no-inference clause in legislative history, precludes retroactive application, despite conflicting case law pre-enactment); *Squire v. Students Book Corp.*, 191 F.2d 1018, 1020 (9th Cir. 1951) (Prospective effective date of 1950 amendment of I.R.C. § 101 ('39 Code), plus no-inference clause in legislative history, precludes retroactive application despite conflicting case law pre-enactment). Same reasoning and conclusion in: *Alumni Ass’n of the Univ. of Or., Inc. v. Comm’r*, T.C. Memo 1996-63 (1996), *aff’d*, 193 F.3d 1098 (9th Cir. 1999); *Anderson v. Commissioner*, 568 F.2d 368 (5th Cir. 1978); *Jacobson v. Commissioner*, 96 T.C. 577, 589 (1991); *Ballard v. Commissioner*, T.C. Memo 1987-128 (1987), *rev’d on other issues*, 854 F.2d 185 (7th Cir. 1988); *Burge v. Commissioner*, 28 T.C. 246 (1957), *aff’d* 253 F.2d 765 (4th Cir. 1958); *Compaq Comp. Corp v. Commissioner*, 113 T.C. 214 (1999); *Frederick Weisman Co. v. Commissioner*, 97 T.C. 563 (1991); *Golden Nugget, Inc. v. Commissioner*, 83 T.C. 28 (1984); *Gregg v. Commissioner*, T.C. Memo 1999-10 (1999); *Hadley v. Commissioner*, 819 F.2d 359 (2d Cir. 1987); *I.R.S. v. CM Holdings, Inc.*, 254 BR 578 (D.Del. 2000); *Mandler v. Commissioner*, 65 T.C. 586; *Planned Parenthood Federation of America v. Commissioner*, TC Memo 1999-206 (1999); *Prabel v. Commissioner*, 91 T.C. 1101, 1115-1116 (1988); *Public Service Co. v. United States*, 1984 U.S. Dist. LEXIS 21271 (D.D.C. 1984); *Snell v. United States*, 1981 U.S. Dist. LEXIS 15453, 5-6 (D. Neb.1981); *Snider v. United States*, 125 F.Supp. 352 (D. Mass. 1954) *aff’d* 224 F.2d 165 (1st Cir. 1955); *South Jersey Sand Co. v. Commissioner*, 30 T.C. 360, *aff’d* 267 F.2d 591 (3d Cir. 1959); *Stokely-Van Camp, Inc. v. United States*, 21 Cl. Ct. 731 (1990), *aff’d* 974 F.2d 1319 (Fed. Cir. 1992); *United States v. Hughes*, 127 L.R.R.M 3126 (N.D. Ohio 1987); *Virginian Limestone Corp. v. Comm’r*, 26 T.C. 553 (1956); *Wilmington Trust Co. v. United States*, 79-1 U.S. Tax Case (CCH) P9223; *Yuen v. Comm’r*, 112 T.C. 123 (1999).

⁵ *See, e.g., American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 993 (10th Cir. 1991); *O’Gilvie v. United States*, 519 U.S. 79, 89-90 (1996); *Squire v. Students Book Corp.*, 191 F.2d 1018, 1020 (9th Cir. 1951); *Anderson v. Comm’r*, 568 F.2d 386 (5th Cir. 1978).

⁶ We found two such cases: *Holiday Village Shopping Ctr. v. United States*, 1985 U.S. App. LEXIS 15261 (Fed. Cir. 1985) (no-inference clause gives retroactive effect to anti-taxpayer provision in DEFRA 1984 governing recapture of excess depreciation on sale of property); *See also Amato v. Western Union Int’l Inc.* 773 F.2d 1402 (2d Cir 1985) (no-inference clause in legislative history, combined with a “clarifying intent” clause elsewhere in legislative

Moreover, even if legislative history omitted the no-inference clause, and stated that Congress's intent was to clarify the law, the probable outcome would be little changed if the statute still specified a July 26, 2005, effective date. When legislative history states that an amendment is intended to clarify the law, or restore the law to Congress's original intent, or even to overturn cases wrongly decided under the law, courts typically do *not* read the amendment as a retroactive clarifier if the statute specifies an effective date. Rather, it is inferred that Congress intends that the law be clarified only after the amendment's specified effective date.⁷

In short, the amendment's July 26, 2005, effective date means it would apply only to new benefits earned thereafter. Current law— including *Cooper* as ultimately decided on appeal, and any other cases decided under current law — would apply to benefits earned before that date.

Bill increases existing *Cooper* risk somewhat. It has been shown that the NESTEG provisions will almost certainly apply only to new benefits earned after July 26, 2005, and current law — whatever that is — will apply to benefits earned before. A second question arises: Could enactment of *new* law with prospective-only effect have an adverse effect on how courts interpret *current law* for pre-July 26, 2005, benefits?

The best-case outcome is that the courts will decide that the new law creates no inference for current law — the technically preferred analysis, and the most likely.⁸ The worst case

history, implies that REA's amendment of the anti-cutback rule intended to apply retroactively to law before effective date), *compare American Stores Co.*, 928 F.2d 986, 993.

⁷ *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 (1977) (Amendment of ADEA § 4(f)(2) with immediate effective date, does not have retroactive effective, despite substantial legislative history stating Congress intended to “clarify” current law and reverse erroneous case law interpreting pre-effective date law); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 168 (1989) (legislative history, stating Congress's intent to clarify ADEA and overturn wrongly-decided *McMann*, did not overcome presumption raised by effective date in statute); *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 993 (10th Cir. 1991) (Despite statement in Ways and Means Committee Report that 1984 REA amendment of anti-cutback rule intended to “clarify” law, 1984 amendment not applied retroactively because of (i) statutory prospective effective date; and (ii) contrary no-inference clause in Senate Finance Committee report). *Cf. Butts v. New York Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1407 (2d Cir. 1993) (legislative history stating Congress's intent to “clarify” or “restore” law does *not* create presumption of retroactivity, but may be considered with other factors). *But see Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir 1985) (Ways and Means Committee Report stating that REA amendments of anti-cutback legislation meant to “clarify” the law, sufficient to show retroactive effect).

Courts have sometimes considered whether the legislative history of various civil rights statutes shows that they have a retroactive, clarifying effect. To the best we can determine, these cases all involved statutes enacted with no specified effective date, and are thus not relevant to the question at issue here. *Compare, e.g., Leake v. Long Island Jewish Medical Center*, 695 F.Supp. 1414 (E.D.N.Y 1988), *aff'd per curiam*, 869 130 (2d Cir. 1989) (legislative history shows Congress intended Civil Rights Restoration Act of 1987 retroactively to clarify Rehabilitation Act of 1973), *Butts v. New York Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1406 (2d Cir., 1993) (legislative history shows Congress intended Civil Rights Act of 1991 to apply prospectively).

⁸ *See, e.g., Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 839-840 (1988) (citing *McMann*: “The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”); *Hawkings v. US*, 30 F.3d 1077 (9th Cir. 1994) (“Thus, an amendment to a statute does not necessarily indicate that the unamended

outcome is that a court might draw the adverse inference that, since anti-*Cooper* legislation was intended to change the law for benefits earned after July 26, 2005, then *Cooper* must be the law for benefits earned before. Such adverse inference decisions are infrequent and are technically problematic, but they are not unheard of.⁹ We could find no support for the argument that anti-*Cooper* legislation enacted with prospective effect would have a helpful implication for current law. Thus, as a theoretical matter, the legislation has a slight but marginally adverse implication for current law.

Looking at what courts do, rather than just what they say, the analysis becomes more troublesome. When interpreting unclear and contentious old law that has since been amended prospectively, courts in practice tend to find that old law is *different* from new law, with one exception. For legislative amendments with a perceived public interest — such as closing tax loopholes or protecting employees’ pension benefits — the courts often find that old law happens to be the *same* as new law.¹⁰

Thus, in practice, case law shows a tilt towards a retroactive, helpful inference for legislative amendments in the perceived public interest —and a prospective, unhelpful inference for all others.¹¹ Unfortunately, this apparent tilt probably works against hybrid plans, rather than for them. If we look to past practice for clues about how the legislation would affect courts’ interpretation of current law, the implication is unhelpful.

statute meant the opposite...That Congress elected to overrule such cases does not prove that, prior to Congress’s action, the statute meant the opposite.”)

⁹ *Trahan v. Regan*, 824 F.2d 96, 105 (D.D.C. 1987) (Congress’s 1984 amendment of tax disclosure statute under TEFRA implies that pre-amendment statute was different); *United States v. Burke*, 504 U.S. 229, 237 (1992) (Congress’ 1989 amendment to IRC § 104(a)(2) provides further support for the conclusion that “personal injuries” in the unamended statute includes physical as well as nonphysical injuries). *Squire v. Students Book Corp.*, 191 F.2d 1018, 1020 (9th Cir. 1951) (dismissing conflicting case law, concludes old law different from new law, in part because “we think it unnecessary again to plow this field more particularly since Congress in the Revenue Act of 1950 has declared a different rule applicable” for future years, and legislative history contained a no-inference clause); *Cf. Jacobson v. Commissioner*, 96 T.C. 577, 589 (1991) (“We read the above-quoted legislative history to simply mean that the adoption of section 707(a)(2)(B) in no way altered the law existing before the actual effective date of that section... Accordingly, respondent’s theory that section 707(a)(2)(B) was a mere ‘recodification’ of preexisting law must fail.”)

¹⁰ We analyzed 26 tax and pension cases on point, namely, cases applying old law but decided after Congress had amended the law with a prospective effective date. *See* cases collected at fn. 4. In all 26 cases, the court expressly held that, in principle, a prospective amendment conveys no inference as to the meaning of old law. In 10 of the 26 cases, the courts found that old law was *different* from new law (*American Stores*; *Hughes*; *Jacobson*; *Wilmington Trust Co.*; *Ballard*; *Anderson*; *Golden Nugget, Inc.*; *Hadley*; *South Jersey Sand Co.*; *Virginia Limestone Corp.*; *Yuen*; *Ogilvie.*). Of the remaining 14 cases, where the court decided that old law happened to be the same as new law, 10 were decided against a taxpayer in favor of the government, or against an employer in favor of employee. (*Squire*; *Burg*; *Compaq Comp. Corp.*; *Frederick Weisman Co.*; *Gregg*; *CM Holdings, Inc.*; *Prabel Public Service Co.*; *Snell*; *Stokely-Van Camp, Inc.*) Only four of the 14 were decided in favor of a taxpayer (*Mandler*; *Alumni Association*; *Planned Parenthood Fed’n of America*; *Snider*) —and two of these involved tax exempt organizations (*Alumni Association*; *Planned Parenthood Fed’n of America*).

¹¹ In 22 of the 26 cases discussed immediately above, the courts decided that old law either was *different* from new law, or happened to be the *same* as new law and was anti-taxpayer or anti-employer.

Effect of past “good” conversion. Some hybrid plans were established with a past conversion that happened to meet all the requirements of the legislation, or with no conversion. How does the foregoing analysis affect these plans? The short answer is that the conclusion is no different: their existing *Cooper* risk is at best not helped, and at worst hurt by the legislation. Here is why:

For the reasons set forth above, courts will almost certainly find that the bill applies only to conversions after July 26, 2005.¹² Conversions before that date will be adjudged solely under current law — whatever that may be.¹³ That an old conversion just happened to meet the new requirements is no basis — theoretical or practical — for thinking that either the conversion or the hybrid design is more likely to be upheld under current law. As a theoretical matter, it is virtually irrelevant to both questions. As a practical matter, any “halo” effect at best goes the other way. The hybrid plan legislation has been cast by its opponents as a giveaway to employers. Analysis of past cases suggests that courts rarely read into old law, no matter how unclear, the perceived giveaways for employers/taxpayers enacted into new law.¹⁴

In any event, any “halo” imparted to an old conversion by new law is irrelevant to the separate question of whether *Cooper* makes the hybrid plan design itself illegal under current law — the main and possibly only issue that plaintiffs and their attorneys will be arguing in court.

Comparison with no enactment. If no anti-*Cooper* provisions are enacted, current law as applied to existing hybrid plan benefits will continue to be thrashed out in the courts. The worst case outcome under current law is that IBM’s *Cooper* appeal will be adversely decided by the Seventh Circuit in late 2006. It can be expected that many hybrid plan sponsors would then decide to terminate their plan or stop accruing further hybrid plan benefits, and so freeze their exposure at its 2006 level.

Conclusion

If enacted with a July 26, 2005, effective date, NESTEG will not reduce plans’ existing *Cooper* risk and will marginally increase it, even for plans with a “conforming” past conversion. It would stomp the growth of future risk, but companies can now do this for themselves at any time by terminating the plan or freezing the hybrid formula. In return, the bill imposes 3-year vesting on hybrid plans, restricts employers’ ability to modify future pension benefits not yet earned, and opens the door for further such restrictions. Accordingly, to the extent a company is concerned about its existing *Cooper* risk of an older hybrid plan — for which the incremental risk of another year of benefit accruals is relatively small — no legislation might be preferable to anti-*Cooper* legislation with a prospective-only effective date.

¹² NESTEG’s effective date for conversions is somewhat unclear. The provisions apply to conversions pursuant to a plan amendment “adopted and effective” after July 26, 2005, and, at the employer’s option, to conversions pursuant to an amendment adopted before that date, if “effective” thereafter. JCX-57-05, July 26, 2005, at p.7 The meaning of “effective” is unclear for conversions, which typically take effect over a period of years.

¹³ See cases collected at fns. 2 and 3, and related discussion.

¹⁴ See discussion at page 4.