

Client Alert

A report
for clients
and friends
of the Firm July 2008

Second Circuit Rules Cash Balance Pension Plans Are Not Age Discriminatory

On July 9, 2008, the U.S. Court of Appeals for the Second Circuit ruled in two parallel appeals that cash balance pension plans do not violate the age discrimination prohibitions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), Section 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). See *Hirt v. The Equitable Retirement Plan for Employees, Managers and Agents*, No. 06-4757 & *Bryerton v. Verizon Communications, Inc.*, No. 07-1680, 2008 WL 2669346 (2d Cir. July 9, 2008). The ruling, which resolved a split among district court decisions in the Second Circuit, follows the holdings of the Third, Sixth and Seventh Circuits, which are the only other Circuit Courts to have addressed the issue.

Section 204(b)(1)(H) provides that “a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee’s benefit accrual is ceased, or the rate of an employee’s benefit accrual is reduced, because of the attainment of any age.” In numerous lawsuits challenging the validity of cash balance plans, participants have contended that these plans violate Section 204(b)(1)(H) because the dollar amount of the pension accumulated by older employees at the time they reach their retirement age is less than the dollar amount accumulated by younger employees with comparable years of service. The seeming discrepancy is merely a function of the time value of money: cash balance accruals earned as of a younger age have more years to accumulate interest before the participant reaches retirement age. The issue applies only retroactively, since the Pension Protection Act of 2006 has insulated

cash balance plans from such challenges on a prospective basis.

Like the other Circuits, the Second Circuit rejected arguments that this “discrepancy” constitutes age discrimination under ERISA. The Court concluded that the “rate of benefit accrual” refers to the employer’s contribution to a plan, and should not be measured by reference to the end product — the age-65 annuity that can be purchased with the account balance. Thus, as long as contributions to the cash balance account are made on a nondiscriminatory basis, there is no violation of ERISA merely because contributions made for younger participants are worth more at age 65 than contributions made for older participants.

The Second Circuit ruling makes it quite likely that the age discrimination issue has been put to bed for cash balance plans. Although there is at least one appeal pending in the Ninth Circuit on this same issue, most anticipate that it too will follow the holdings and reasoning of the four Circuit Courts that have unanimously rejected these claims. Should the Ninth Circuit (or any other Circuit) rule to the contrary, however, there might still be a need for Supreme Court resolution. Stay tuned.

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If you have any questions about the impact of this new decision, please contact your Proskauer relationship attorney or one of the attorneys listed below:

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