ASPA
Dedicated to the Private Pension System

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Neither A Plan Lender Nor A Participant Borrower Be?

by James C. Paul, APM and Kenneth W. Ruthenberg, Jr.

An Overview of DOL and IRS Rules on Participant Loans

THE HANDLING AND MISHANDLING OF PARTICIPANT LOANS FROM RETIREMENT PLANS REPRESENT A NEVER-ENDING SOURCE OF "JOY" FOR PARTICIPANTS, PLAN SPONSORS, TRUSTEES, PLAN ADMINISTRATORS, THIRD-PARTY ADMINISTRATORS, ACCOUNTANTS, AND ATTORNEYS. WHY ALL THE FUN? BECAUSE A PARTICIPANT LOAN, IF NOT PROPERLY HANDLED, CAN RESULT IN INCOME TAX SURPRISES, PROHIBITED TRANSACTION EXCISE TAXES, AND EVEN PLAN DISQUALIFICATION!

Plan loans also represent a great source of joy for IRS and Department of Labor (DOL) auditors. For example, if your plan is being audited by the IRS, the auditor is trained like a bloodhound to zero in on any and all loan problems.

This article presents a broad overview of the fun that you, too, can have in working with the participant loan income tax rules (and a brief overview of the prohibited transaction rules).

Income Tax Surprises!

In the good old days (prior to 1982, but after 1974—we won't go as far back as the prehistoric, pre-ERISA age), participants used to be able to borrow from their retirement plans with only the prohibited transaction rules hanging over their heads. So long as these rules were observed and the "loans" were not disguised

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Washington Update

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Cash Balance Plans: The Other Side of the Story

by Brian H. Graff, Esq.

CASH BALANCE PLANS HAVE BEEN THE SUBJECT OF SIGNIFICANT CONTROVERSY IN RECENT YEARS. THIS CONTROVERSY HAS CENTERED ON SO-CALLED "CONVERSIONS" OF TRADITIONAL DEFINED BENEFIT PLANS TO CASH BALANCE PLANS. RECENTLY ISSUED PROPOSED REGULATIONS ADDRESSING CASH BALANCE PLANS AND THEIR INTERACTION WITH AGE DISCRIMINATION RULES HAVE RENEWED FOCUS AND ATTENTION, INCLUDING BY THE MEDIA AND CONGRESS, ON THE CONVERSION ISSUE.

However, there is another side to the story that has not made the headlines. Besides addressing cash balance plans resulting from a conversion, the proposed regulations address new cash balance plans adopted where there was no preexisting defined benefit plan. Seventy-five percent of our nation's private workforce is not covered by any defined benefit plan—traditional or cash balance. If the legal uncertainties surrounding cash balance plans are adequately and sensibly addressed, ASPA believes that cash balance plans could become a viable option for employers who are not providing a defined benefit plan, particularly small and mid-sized companies.

We were asked by Treasury to focus our written comments (refer to page 10), as well as our oral testimony (set out below) at the April 9 hearing on the proposed regulations, on the impact of the regulations on these new (non-converted) cash balance plans. This is certainly not to suggest that we do not recognize as important the many issues surrounding cash balance plan conversions. However, there have been numerous comments filed addressing conversion issues by various groups (representing participants, employers, and practitioners), and ASPA's Government Affairs Committee determined that it was critically important that our comments clearly highlight and emphasize the importance of promoting new defined benefit plan coverage without the distractions surrounding conversions.

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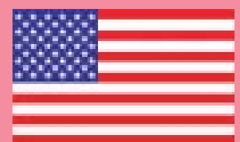

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From the Editor

Baseball, Hot Dogs, Apple Pie…and a History Lesson!

by Chris L. Stroud, MSPA

AS I WAS THINKING ABOUT WHAT TO WRITE FOR THIS ISSUE'S EDITORIAL, I REALIZED THAT YOU WOULD PROBABLY BE READING IT BETWEEN MEMORIAL DAY AND INDEPENDENCE DAY. WHAT DO THOSE DAYS BRING TO MIND—THREE-DAY WEEKENDS, RIGHT? HOWEVER, SINCE I'VE SPENT MANY PAST EVENINGS GLUED TO CNN, AND I'M SURE MANY OF YOU HAVE TOO, IT SEEMED A BIT PETTY TO FOCUS ON HOLIDAY GETAWAYS AND SUMMER VACATIONS RIGHT NOW. EVEN MY PASSION FOR PENSIONS AND MY INTEREST IN THE PRESIDENT'S BUDGET PROPOSAL WERE SOMEWHAT DULLED BY WHAT WAS HAPPENING ON THE OTHER SIDE OF THE WORLD. MANY OF MY FRIENDS HAVE EXPRESSED FEELINGS SIMILAR TO MY OWN—THAT IT'S HARD NOT TO FEEL GUILTY THAT OUR LIVES WERE PROGRESSING IN A RELATIVELY NORMAL MANNER WHILE OTHERS WERE FAR AWAY FIGHTING AND DYING TO ENSURE OUR FREEDOM. I CHOSE, MAYBE TO RELIEVE SOME OF MY OWN GUILT, TO FOCUS ON MEMORIAL DAY.

Most of us know the history behind Independence Day, but have you ever really studied the history of Memorial Day? My father was a World War II veteran and taught me to be patriotic and to observe Memorial Day. I even helped distribute poppies for the VFW and the American Legion. I understood that the day was to honor those who had died to protect our freedom, and I enjoyed many Memorial Day parades and celebrations. Now I wanted to know more.

I was amazed when I did a search on "Memorial Day" on AOL and was brought to page 1 of 128,667. (No, that's not a typo!) I started reading and became so engrossed that it was hard for me to stop. Here are some of the fruits of my Web search:

- Memorial Day is a day of national mourning. All US flags should be displayed at half-staff during the morning hours, and then raised back to full-staff at noon.
- In 1863, Lincoln's Gettysburg Address was in some ways the first observance of Memorial Day, as he spoke of the honored dead who "…gave the last full measure of devotion…."
- In 1865, Henry C. Welles, a druggist in Waterloo, NY, began promoting the idea of decorating the graves of Civil War veterans.
- In 1868, General John A. Logan, first commander of the Grand Army of the Republic, issued General Order No. 11, designating May 30, 1868, as the day for strewing flowers or otherwise decorating the graves of comrades who died in defense of their country. It was referred to as "Decoration Day" and continued to be celebrated every year on May 30.
- In 1882, the name was officially changed to Memorial Day, and soldiers who had died in all wars were honored.
- In 1915, Moina Michael, inspired by the poem *In Flanders Field,* conceived of the idea to wear red poppies on Memorial Day in honor of those who died serving the nation during war. She sold them to friends and coworkers, with the money going to benefit servicemen in need. She also wrote her own poem (see page 4).
- Several towns, including northern and southern cities, claimed to be the birthplace of Memorial Day, observing the day and honoring fallen soldiers in various ways. However, in 1966, President Lyndon Johnson declared Waterloo, NY, the official birthplace of Memorial Day. (Waterloo was chosen because, since 1868, the town had made Memorial Day an annual, community-wide

THE ASPA JOURNAL

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The purpose of ASPA is to educate pension actuaries, consultants, administrators, and other benefits professionals, and to preserve and enhance the private pension system as part of the development of a cohesive and coherent national retirement income policy.

ASPA members are retirement plan professionals in a highly diversified, technical, and regulated industry. ASPA is made up of individuals who have chosen to be among the most dedicated practicing in the profession, and who view retirement plan work as a career.

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> *We cherish too, the Poppy red*
>
> *That grows on fields where valor led,*
>
> *It seems to signal to the skies*
>
> *That blood of heroes never dies.*

event during which businesses closed and residents decorated the graves of soldiers.)

- In 1971, Congress declared Memorial Day a national holiday, to be celebrated the last Monday in May.
- In 1999, Senator Inouye and Representative Gibbons introduced separate bills proposing to restore the traditional day of observance back to May 30, proclaiming that the three-day weekend had undermined the holiday and that the true meaning and traditions of Memorial Day were being forgotten.
- In 2000, a National Moment of Remembrance resolution was passed, asking all Americans to voluntarily pause for one minute at 3:00 p.m. local time on each Memorial Day and "remember and reflect on the sacrifices made by so many to provide freedom for all."

If you decide to try the Web exercise yourself, be prepared to be a little overwhelmed with emotions and patriotic feelings as you surf. You'll hear Taps and other familiar songs, see streaming videos and graphics of beautiful flags waving, and read emotional tales of loved ones lost in wars. It might even be a good exercise for your children or grandchildren. After all, it's important that future generations don't just think of Memorial Day as a three-day weekend. I know I won't. ▲

Letters to the Editor

In Memoriam

Joseph Dean, MSPA

1924–2003

ERISA Errata?

Sal Tripodi's 2002 ERISA Outline Book seems to contradict your ASPA Journal supplement, Jan–Feb 2003, regarding SEP-IRAs. He states in Chapter 12 that the 402(h) limit is still 15% despite the increase in the 415 limit to $40,000 or 100% of pay. Who's right?

Maurice J. Reidy
WESPAC
Oakland, CA

We checked with Sal, our "pension pal," and he explained the following: "You are referring to the 2002 ERISA Outline Book, which predated the fix by the Job Creation and Worker Assistance Act of 2002 (JCWAA). The incongruity of the 15% limit under 402(h) and the 25% limit (enacted by EGTRRA) under 404(h), as I discussed in the 2002 Edition, was the reason for the technical correction in the JCWAA. I posted at my Web site information about that change after the JCWAA was enacted. Of course, the 2003 Edition reflects the JCWAA amendment."

Editor's Note: *The 2003 ERISA Outline Book is now available from ASPA. To check for changes that occur during the year that might affect topics covered in the book, you can access Sal's Web site at www.cybERISA.com.*

—Chris

Scrambled Word Scramble

Being a fan of word scrambles, I just wanted to mention there is a problem with your Jan/Feb puzzle. Wrong letters circled? There is no "x" in simple plan. Disappointing.

Rhonda L. Corbitt
Financial Decisions
Stockton, CA

Thanks for bringing this mistake to our attention. You are correct, and we are very sorry. We got a little scrambled up in the Jan/Feb 2003 issue. We mixed up our underscores and circles in the four words, which is why the puzzle doesn't solve correctly. (Too bad it was too early for April Fools' Day, or we could use that for an excuse!) We'll be more careful in the future and hopefully you'll continue to enjoy future Word Scrambles and puzzles.

—Chris

Continued from page 1

Washington Update

In fact, ASPA was the sole witness at the hearing stressing the potential positive impact cash balance plans could have on new defined benefit plan coverage. There were 48 witnesses who testified at the two-day hearing. The first three were members of the US House of Representatives, including Rep. Bernie Sanders (I-VT), a longtime critic of cash balance plans. The next two were participants in traditional defined benefit plans that had been converted. I then followed, on behalf of ASPA, as the first witness to testify in favor of cash balance plans and the important role they could potentially play in providing working Americans with a secure retirement.

More work certainly needs to get done before cash balance plans can become a practical alternative for employers. Significantly, problems caused by the "whipsaw" issue, which often results in lump sums differing from participant account balances, must be addressed before smaller employers will adopt these plans in large numbers. ASPA GAC already has had several conversations with Treasury on this point and we are reasonably confident that proposed regulations addressing this problem in a reasonable way will be released soon.

Proposed regulations amending the nondiscrimination rules accompanied the cash balance age discrimination regulations. ASPA had several concerns with these proposed regulations, which were withdrawn just prior to the hearing, and we will be meeting with Treasury and IRS to go over the concerns since it is expected that the proposed nondiscrimination regulations will be reissued. Particularly, we have concerns about the 7.5 percent gateway requirement imposed on cash balance plans that are cross-tested. This gateway is the same as the gateway for cross-tested combination defined benefit-defined contribution plans. Why would a small plan sponsor ever consider a cross-tested cash balance plan, with the responsibility of guaranteed benefits and the cost of PBGC premiums, if the same results could be achieved at the same gateway cost with a combination plan, but without such liability for investment performance and PBGC premiums? If the policy goal is and should be to promote defined benefit plan coverage, the gateway for cash balance plans

Available Webcast Recordings

Missed a recent ASPA webcast? Need two extra ASPA CE credits? Check out the list of webcast recordings that are available on ASPA's Web site at **http://www.aspa.org/webcast/**. These archives are available for accessing at your convenience, any day, any time. Each webcast runs approximately 100 minutes in length. Visit the Web page identified above to find out more!

The following webcasts are currently available:

2002 Form 5500 and Related Compliance Issues
Valeri L. Stevens, APM
Available until April 30, 2004

IRS/ASPA Washington Update
Brian H. Graff, Esq., *et al.*
Available until March 31, 2004

Participant Loans
Jane E. Armstrong
Available until March 31, 2004

Top 15 Pitfalls in Plan Administration
Ilene H. Ferenczy, CPC
Available until November 30, 2003

The Latest in Plan Design
Joan A. Gucciardi, MSPA, CPC
Available until August 30, 2003

Practical Tips on Participant Loans
Cheryl L. Morgan, CPC
Available until August 30, 2003

Controlled Groups, Affiliated Service Groups, and Issues of Common Control
S. Derrin Watson
Available until July 31, 2003

Practical Tips on Distribution Procedures
Cheryl L. Morgan, CPC
Available until July 31, 2003

Top Heavy Under EGTRRA
Cheryl L. Morgan, CPC
Available until June 30, 2003

Cost:
$125 for Members
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must be modified to properly encourage such plans. ASPA will certainly be leading the way toward finding a rational solution.

Actual Testimony for Cash Balance Hearing

Thank you, representatives from Treasury and IRS, for this opportunity to testify on this important subject. My name is Brian Graff and I am the Executive Director of the American Society of Pension Actuaries. ASPA is an organization of over 5,000 retirement plan professionals who assist small to mid-sized companies nationwide in establishing and maintaining retirement plans covering millions of American workers. All of ASPA's members are united by a common dedication to a strong private retirement plan system.

I would also like to speak today on behalf of a group of Americans who are not represented at this hearing. These are the approximately 80 million working Americans who are not covered by a defined benefit plan. Seventy-five percent of our private workforce is not covered by a plan that provides guaranteed benefits. The lack of defined benefit plan coverage is even more acute among small business workers. Less than two percent of the 40 million workers who are employed at firms with less than 100 employees are covered by a defined benefit plan.

These Americans will not have had their benefits affected by one of the "conversions" that will be discussed by many commentators at this hearing since they never had any defined benefits to begin with. They work at companies that you have never heard of, companies that do not have commercials on TV, but companies that will lead our economic recovery. Don't the workers at these companies deserve a chance at a secure retirement?

Some of these workers, if they are fortunate enough, have at least been covered by a defined contribution plan like a 401(k) plan. However, have you looked at your 401(k) statement recently? The front cover of this month's Money Magazine is entitled "Should you dump your 401(k)?" Workers throughout the country have been joking that their 401(k) plan should be called a 201(k) plan. But it is not funny if you are about to retire. The S&P 500 has dropped 16 percent over the last three years. According to a recent study by the Employee Benefit Research Institute, a three-year bear market immediately prior to retirement can significantly reduce income replacement rates generated by 401(k) accounts.

Right now, this is a very real issue for millions of American workers relying solely on defined contribution vehicles for retirement savings who have been forced to either delay retirement or seriously reevaluate their retirement standard of living expectations. The effect is more than just not being able to buy that dream retirement home. It can be the difference between being able to afford adequate long-term care or needed, but expensive, prescription drugs. These unfortunate consequences would have been greatly diminished if these Americans had been covered by a defined benefit plan providing guaranteed retirement benefits, not subject to the whims of investment markets.

Defined benefit pension plans provide a guaranteed monthly retirement benefit for employees. This annuity benefit continues for the life of the worker and cannot be exhausted. 401(k) plan benefits are not guaranteed. Ultimately, the level of benefits from a 401(k) plan and the length of time they continue to be paid are unknown to the retiree. Without increased defined benefit plan coverage, as Americans live longer than ever before, there is a greater risk that many Americans will outlive their retirement savings.

Ironically, according to a recent survey published in Plan Sponsor magazine, interest in defined benefit plan coverage among employees has increased by 20 percent as employees find it difficult to manage their 401(k) plan accounts. However, small and mid-sized businesses are no longer interested in traditional defined benefit plans because of their inherent funding uncertainties and because employees simply do not understand them. Cash balance plans can provide employers with more predictable funding requirements and, because of their "account-based" nature, they are often more appreciated by employees.

Remember, I am talking about employees currently without a defined benefit plan. Faced with consistent 401(k) plan account losses, a cash balance plan funded with employer contributions and with a guaranteed rate of return looks pretty good right now. Any worker covered only by a 401(k) plan would welcome the prospect of coverage under a cash balance plan funded by the employer and providing certainty respecting investments. In fact, putting aside any issues of "conversions," no rational or cogent policy argument could possibly be made that workers without any preexisting defined benefit plan are also better off without a cash balance plan.

For better or worse, the last and best hope for promoting new defined benefit plan coverage is cash balance or similar hybrid plans. The good news is that there are thousands of businesses throughout the country who, in light of current developments in the stock market, might be interested in adopting a defined benefit plan like a cash balance plan for their workers. Such plans could potentially cover millions of American workers. However, there are a number of significant legal uncertainties associated with cash balance plans because of the way benefits are

accrued and distributed as compared to traditional defined benefit pension plans. Although these issues are technical in nature, they are critical to the legal operation of the plan.

The proposed regulations, in part, address these legal issues. Future guidance is expected to address the so-called "whipsaw" problem. Small and mid-sized companies are willing to guarantee market rates of return for employees, but in return they would like certainty as to the amount of benefits they are actually providing, not some mysterious benefit that is calculated using a wholly unrelated interest-rate benchmark that no longer has any economic substance. It is imperative that future guidance on cash balance plans does not ignore this issue.

Unlike their larger firm counterparts, small and mid-sized businesses cannot afford high-priced lawyers to provide legal opinions allowing them to sort through the various unanswered questions. Until all of the important legal uncertainties surrounding cash balance plans are resolved in a clear and unambiguous way, small and mid-sized companies will refrain from offering these valuable defined benefits to employees.

Unfortunately, a number of witnesses at today's and tomorrow's hearing will be calling for the complete withdrawal of these proposed regulations despite their clear application to cash balance plans not created as a result of a conversion. Such suggestions are entirely irresponsible. It would seem that such part-time pension pundits simply do not care about the 80 million working Americans without any defined benefit plan, but would rather exploit a political issue that would ultimately be to the detriment of these workers. Such a result would be extremely unfortunate retirement policy, and ASPA implores both Treasury and IRS to ignore such pleas. As you listen to the testimony today and tomorrow, please do not forget about these uncovered workers.

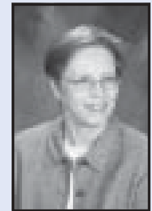
ASPA appreciates the efforts of the staff at all of the participating agencies in this project. Given all of the competing interests, striking the appropriate balance is not an easy task and the proposed regulations represent an important first step toward finding the right balance. We commend you for your efforts and urge you to stay the course.

Any legislative or regulatory policy must keep in mind the vital role defined benefit plans play in providing working Americans with a more secure retirement. ASPA strongly believes that the intent and spirit of the proposed regulations is wholly consistent with this critical objective. Account-based defined benefit plans, like cash balance plans, constitute vital and powerful tools for building a stronger and more effective private retirement system. When these regulations are completely finalized, it will most certainly lead to a significant number of new plans, particularly among small and mid-sized employers, providing defined benefits to employees who have never before had such benefits. We encourage you to finalize the regulations swiftly so that millions of working Americans at small and mid-sized companies nationwide have the opportunity to achieve a secure retirement future.

Thank you. ▲

Brian H. Graff, Esq., is the Executive Director of ASPA. Before joining ASPA, Brian was legislation counsel to the US Congress Joint Committee on Taxation.

Ms. Miller Comes to Washington!



ASPA Member Hired as Senior Pension and Benefits Advisor for the US Senate Finance Committee (Democratic Staff)

ASPA member, **Judy A. Miller, MSPA,** of Helena, MT, was recently hired to serve as Senior Pension and Benefits Advisor for the Senate Finance Committee (Democratic Staff). The ranking Democratic member of the Senate Finance Committee is Senator Max Baucus (D-MT).

Judy has been a member of ASPA for 22 years and has almost 30 years of experience providing actuarial and consulting services to private employers and their retirement plans.

Judy has worked as a consulting actuary with Employee Benefit Resources, LLP, in Helena, MT for the past six years. Judy has her BS in Mathematics from Carnegie Mellon University.

ASPA is thrilled to have such an experienced and talented individual working in this important retirement policy position. Please join us in congratulating Judy—we very much look forward to working with her.

ASPA has 44 other members working for the government and we appreciate their efforts and service to the nation.

Davis-Bacon Prevailing Wage Retirement Plans

by Amy L. Cavanaugh, CPC, QPA, QKA

THROUGH THE YEARS, DAVIS-BACON PLANS HAVE BEEN SHROUDED IN MYSTERY. MANY PRACTITIONERS ARE NEVER QUITE SURE WHAT TO DO WITH THEM—THEY ARE NOT TAFT-HARTLEY PLANS, BUT THEY DO NOT QUITE FIT INTO THE TRADITIONAL SCHEME OF RETIREMENT PLAN ADMINISTRATION EITHER. FOR THE MOST PART, THE MYSTERY SURROUNDING DAVIS-BACON PLANS IS CAUSED BECAUSE THERE IS NO DAVIS-BACON GUIDANCE WITHIN THE RETIREMENT PROVISIONS OF THE INTERNAL REVENUE CODE OR ERISA. ALL OF THE DESIGN CONSTRAINTS THAT APPLY TO DAVIS-BACON PLANS ARE FOUND IN THE DAVIS-BACON ACT ITSELF, NOT THE CODE OR ERISA. ONCE A PRACTITIONER KNOWS THE DAVIS-BACON RULES, THESE PLANS ARE ACTUALLY QUITE EASY TO ADMINISTER. PRACTITIONERS WHO ARE KNOWLEDGEABLE ABOUT DAVIS-BACON PLANS AND OTHER PREVAILING WAGE PROGRAMS CAN FILL A VALUABLE NICHE IN THE RETIREMENT PLAN MARKETPLACE.

Background

The Davis-Bacon Act is federal legislation that was enacted during the depression era (1931) to prevent unfair labor practices in nonunion situations. It was amended in 1935 to establish a system of setting wage rates in advance of the contract bidding. In 1964, it was amended to include fringe benefits as well as wages. The purpose of the Act was to support labor unions by protecting workers from the economic disruption caused by out of town contractors coming into an area and securing federal construction contracts by underbidding local wage levels. During the depression, it was common for a businessman to gather crews of low-paid workers from rural areas and take these crews to metropolitan areas in order to underbid established local construction companies. Currently the Davis-Bacon Act requires any contractor bidding on a government job in excess of $2,000 to pay workers at a "prevailing wage." (The Davis-Bacon Act, PL 97-470, is codified at 40 USC §§276a, *et. seq.*)

Prevailing wage compensation can be broken down into two components—the prevailing wage and the prevailing wage fringe. Davis-Bacon prevailing wages must be paid unconditionally and not less often than once a week. A contractor may discharge his obligation for the payment of the basic hourly rates and the fringe benefits in the following ways:

- By paying not less than the basic hourly rate and making a contribution for the fringe benefits in the wage determination;
- By paying in cash directly for the basic hourly rate and making an additional cash payment in lieu of the required benefits; or
- By a combination of the above methods.

As its name implies, the prevailing wage fringe component is intended to pay for employee fringe and welfare benefits such as health insurance. The fringe piece can be banked to pay for health insurance in the future (during times of layoff or unemployment). Although the fringe piece can be paid as wages (pursuant to Rev. Rul. 75-241), if the fringe piece of the compensation package is paid to the worker as compensation, it becomes subject to FICA and other payroll taxes. It also becomes wages for purposes of determining workers' compensation premiums. Despite the additional tax liability to both the contractor and the employee, contractors all too frequently pay the fringe wages in the form of compensation. In some areas, this is necessary in order to get qualified workers; in other instances, contractors claim it is just easier. Through a combination of attractive plan design and good communication, a Davis-Bacon plan could be just as easy and just as attractive, if not more attractive, than payment in cash.

In a Davis-Bacon retirement plan, Davis-Bacon workers are provided with deferred compensation and tax favored accumulation while avoiding the costly ramifications of the fringe benefit component being classified as wages. This cost avoidance feature is advantageous to both the contractor and the employee. The contractor will recognize payroll tax savings, and Davis-Bacon fringe wages can also be contributed to a qualified plan and used as the required contributions for a safe-harbor 401(k) or the gateway allocation in a cross-tested defined contribution plan. In both of these instances, with a properly crafted plan, the contractor can discharge his or her Davis-Bacon obligation and at the same time set the foundation for maximizing deferrals and other contributions on his or her own behalf. Additionally, there are also many creative welfare benefit trust plan designs that would permit the employee to choose among different benefits, including a retirement plan; however, the focus of this article is designing qualified retirement plans that shelter Davis-Bacon fringe benefit wages.

Continued on page 21

A View From Above the Summit: An Attendee's Perspective of ASPA's 401(k) Sales Summit

by Jay Thomas Scholz, CPC, QPA, QKA

A LONG TIME AGO, AN INFORMED BUT NOT VERY ENLIGHTENED LEADER/SALESPERSON MADE AN ERRONEOUS STATEMENT. LIKE ANY GOOD URBAN MYTH, IT WAS REPEATED AND PERPETUATED OVER AND OVER UNTIL ALMOST EVERYONE BELIEVED IT TO BE TRUE. THE STATEMENT, WHICH WE HAVE ALL HEARD AND, AT A MINIMUM, HAVE SUBCONSCIOUSLY BELIEVED IS, "IT IS LONELY AT THE TOP." DR. JOHN C. MAXWELL, ONE OF THE NATION'S TOP EXPERTS IN LEADERSHIP TRAINING AND DEVELOPMENT, WAS THE FIRST TO DESTROY THIS MYTH FOR ME. HE CORRECTLY STATED THAT THE HALLMARK OF ANY GOOD LEADER/SALESPERSON IS THE ABILITY TO BRING OTHERS ALONG ON THE JOURNEY TOWARD SUCCESS. HE STATES IN THE LAW OF SIGNIFICANCE THAT, "ONE IS TOO SMALL A NUMBER TO ACHIEVE GREATNESS." IF YOU EVER FIND YOURSELF LONELY AT THE TOP OF YOUR MOUNTAIN, WHATEVER THAT MAY BE, GO BACK DOWN AND BRING SOMEONE UP TO KEEP YOU COMPANY!

It is this same spirit of willingness to share ideas—to help pension professionals attract and retain more and better clients—that makes the ASPA 401(k) Sales Summit such a success in only two years of existence. This year's Sales Summit was held February 27 – March 1, 2003, in Scottsdale, Arizona. I attended the Sales Summit in both 2002 and 2003. In this article I hope to give a general overview of the conference, point out some memorable moments, contrast the 2003 to the 2002 program, and lay out some thoughts for improvements to future programs. Finally, I will conclude with a sales success story. Salespeople, next to the sale itself, love a sales story because it helps to solidify, elucidate, educate, and memorialize a sales success.

It has been said that William James and Napoleon Hill wrote some of the first and most comprehensive sales programs, and every permutation of sales programs since has effectively been plagiarism. With that thought in mind, as I recap the sales ideas offered at the Summit, I am less concerned with the source of the comment than with the wisdom it contains. A long-standing belief about attending conferences is that if you can get one good idea that can be immediately implemented into your business, the seminar has paid for itself. Over the years I have found this to be true. Many times the best ideas do not come from the podium, but from private conversations. This concept is especially true of a program like the 401(k) Sales Summit.

The Sales Summit is first and foremost a relationship conference. ASPA, as an educational organization, offers many very fine technical conferences throughout the year. What is unique about the Sales Summit, because of the diverse attendees it attracts, is that sales people and TPAs have opportunities to network and establish alliances. That is not to say that interaction between attendees is lacking at other ASPA programs. It is just that with the other ASPA programs, the educational content takes priority, as it should, and the networking is secondary.

At the Sales Summit, the 2003 program content was enjoyable and centered more on the sales/relationship process than the 2002 program did. There was a recurring and underlying theme of "Service, more than expected, will get and keep the business for you." Repeatedly, it was asserted that the primary reason plan service providers are replaced is due to lack of service, not investment returns. Several speakers advised the attendees to focus on the needs of the participants in order to make the plan sponsor happy.

Another striking difference from the 2002 Summit to the 2003 Summit was the quality of the outlines provided. In 2002, many of the presenters, either because they were salespeople and hated paperwork, or due to other constraints, omitted having outlines or had very limited outlines. In 2003, with some exceptions, the outlines were more comprehensive and could be used as an actual resource for future reference. This area improved but still needs some work for future programs. It

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Comments on Reductions of Accruals and Allocations Because of the Attainment of Any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans

by Edward E. Burrows, MSPA, Lawrence Deutsch, MSPA, Marjorie R. Martin, MSPA, and Fredric S. Singerman

NOTE FROM THE EDITOR: THE FOLLOWING COMMENTS WERE SUBMITTED BY ASPA'S GOVERNMENT AFFAIRS COMMITTEE TO THE INTERNAL REVENUE SERVICE ON MARCH 13, 2003, IN RESPONSE TO PROPOSED REGULATIONS. THE ASPA JOURNAL COMMITTEE FELT THAT THE CASH BALANCE ISSUE IS OF SUCH IMPORTANCE THAT IT WANTED TO REPRODUCE THE COMMENTS IN THEIR ENTIRETY FOR ASPA MEMBERS.

The American Society of Pension Actuaries (ASPA) offers the following comments on the proposed regulations under Internal Revenue Code Sections 401 and 411, issued on December 10, 2002 (proposed regulations).

ASPA is a national organization of approximately 5,000 members who provide actuarial, administrative, consulting, legal, and other professional services for qualified and other retirement plans.

The importance of promoting defined benefit plan coverage for our nation's workers cannot be understated. Due to the decline in the stock market, millions of American workers relying solely on defined contribution vehicles for retirement savings have been forced to either delay retirement or seriously reevaluate their retirement standard of living expectations. These unfortunate consequences would have been greatly diminished if these Americans had been covered by a defined benefit plan providing guaranteed retirement benefits, not subject to the whims of investment markets. Any legislative or regulatory policy must keep in mind the vital role defined benefit plans play in providing working Americans with a more secure retirement. ASPA strongly believes the intent and spirit of the proposed regulations is wholly consistent with this critical objective.

ASPA commends the Service for issuing the much-needed guidance, particularly those aspects of the proposal that deal with account-based defined benefit plans. These account-based plans constitute vital and powerful tools for building a stronger and more effective national retirement system. Until now, a large and difficult impediment to the growth of account-based defined benefit plans has been the uncertainty over how age discrimination rules apply to them. By publishing proposed guidance, IRS and Treasury have taken an important first step towards removing this roadblock.

It is imperative that a distinction be made between the issues surrounding so-called "conversions" to cash balance plans from traditional defined benefit plans as opposed to cash balance plans in and of themselves. There are tens of millions of American workers, particularly those who work at small to mid-sized companies, who have no defined benefit plan coverage at all. For these workers, coverage under a cash balance plan, with employer-funded contributions and guaranteed rates of return, would be a welcome change from 401(k) plan account statements showing dramatic losses. No rational or cogent policy argument could possibly be made that these workers without any preexisting defined benefit plan are somehow not better off with a cash balance plan. Consequently, these comments intentionally focus on cash balance issues not pertaining to conversions. This is not to suggest that ASPA is not concerned with any of the issues raised by the portions of the proposed regulations applicable to conversions. Rather, since we recognize that many other commentators will be discussing those issues, we wanted to emphasize the important role these regulations will play toward the creation of new defined benefit plans providing millions of Americans with the opportunity for a more secure retirement.

ASPA urges IRS and Treasury to issue final regulations as rapidly as careful deliberation will permit. While the proposed regulations focus on only one variety of account-based plans—namely, conventional cash balance plans—ASPA believes the final regulations should emphasize flexibility in acceptable plan designs. The proposed regulations already move significantly towards this goal. For example, in discussing interest credits, ASPA applauds the use of words like "reasonable" and the avoidance of specified arbitrary interest rate boundaries.

ASPA cautions that decisions on age discrimination, whipsaw, accrual rule requirements, and nondiscrimination requirements are likely to have a profound effect on efforts to craft reasonable phased retirement programs.

Given the convergence of rules under Section 417(e) and these proposed regulations, ASPA believes it is

imperative that the Section 417(e) whipsaw issue be resolved before any further amendments are made to the Section 401(a)(4) regulations for cash balance plans.

Summary of Comments

In summary, ASPA's comments on the proposed regulations recommend that final regulations:

Include rules that permit (i) age discrimination tests to be optionally applied using either accrued-to-date (or average) benefit rates or year-to-year accrual rates, (ii) fresh start rules similar to those in the Section 401(a)(4) nondiscrimination regulations, and (iii) plan sponsors to ignore actuarial increases in testing Section 411(b)(1)(H) compliance following normal retirement date.

Recognize that a benefit is nondiscriminatory if it is the sum of, or the greater of, two or more nondiscriminatory benefit formulas whether the benefits are provided in the same or different plans. Furthermore, the ability to aggregate and disaggregate plans for purposes of age discrimination testing should be available.

Provide rules that a pension equity plan, which could have satisfied Section 411(b)(1)(H) if reasonable interest credits had replaced pay change adjustments, be deemed to satisfy Section 411(b)(1)(H).

Discussion

Annual versus Accrued-to-Date Testing

The preamble to the proposed rules requests comments regarding whether an averaging method should be permitted. ASPA believes it should. A final rule that looks to the entirety of what has been accrued rather than a slice based on a 12-month period addresses the anomalies that have been presented in the proposed rule. Testing based on the benefit accrued to date (from a fresh start date where relevant), or an annualized rate developed by dividing that accrued benefit by the period of service or participation used to determine benefits under the plan, should be recognized as suitable alternatives.

Existing methodologies for developing accrual rates, including rules for "fresh starts," exist in the extensive Section 401(a)(4) regulations. These regulations, like Section 411(b)(1)(H), require an examination of what is happening year-by-year. The Section 401(a)(4) regulations permit performance of year-by-year tests using averages (accrued-to-date). Regulations under Section 411(b)(1)(H) should permit the same approach.

It is difficult to isolate the cause of the decrease in the rate of accrual when accrual is tested on an annual basis. In many cases, the fluctuation is due not to age but to the salary pattern or to amounts earned in earlier years. Amounts earned in an earlier year that might have influence on a current accrual should not be treated as illegally age-related if the earlier accruals are a function of the number of years of service worked, for example, or if the earlier accruals had actually left older workers better off.

Consider proposed regulation Section 1.411(b)-2(b)(3)(iii), Example 8. The essence of what occurs in this example is that for the first 20 years of service "O" (age 70) accrued a benefit of 2% of pay per year, while "N" (age 64) accrued a benefit of 1.9524% of pay per year. "O" accrued this additional amount because the plan, by design, provides more generous accruals to employees who enter after age 45. Over the first 20 years, "O" accrued a benefit of 40% of pay, while "N" accrued 39.0476% of pay. In year 21, "O" accrues an additional 1% of pay for a total of 41% of pay; "N" continues to accrue at the rate of 1.9524% of pay and achieves a total accrual of 41% of pay. At this point the total accrued benefit for both employees, who are the same in all respects except for age, is the same.

Favoring a worker who becomes employed at an older age should not be discriminatory under the ADEA.

Ironically, one solution the plan could apply is to accelerate the accrual for "N." If "N" accrued the benefit at 2% of pay for the first 20 years, then "O" would only need to accrue 1% in year 21. The logic of this example is that "O" is discriminated against because younger employee "N" received a smaller amount in earlier years, which merely proves that the older employee had, in fact, enjoyed a better deal up to the point when the benefits become equal.

ASPA recommends that age discrimination tests be optionally applied using accrued-to-date benefits (average accruals), year-by-year accruals, and fresh start rules similar to those currently found in the Section 401(a)(4) nondiscrimination regulations.

Post NRA Accruals

Actuarial increases past normal retirement age should not be the source of additional problems or plan design pitfalls. The granting of actuarial increases during postponed retirement is generally viewed as favoring older workers, not discriminating against them.

In the case of post normal retirement accruals (*i.e.,* prior to age 70½), examining compliance with the nondiscrimination rules on an aggregate (accrued-to-date) method would eliminate the possibility that an employer be "punished" for choosing to provide an actuarial increase to reflect interest and mortality gains lost by a participant who continues in service while foregoing current pension payments. Such an employer could have distributed "suspension of benefit" notices and given no such increase. The

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Neither A Plan Lender Nor A Participant Borrower Be?

actual distributions, participants had a great time borrowing from their plans almost with abandon.

Unfortunately, Congress thought participants were having too much fun and that plan funds were being improperly used, thereby diminishing retirement savings (we can't imagine where they'd get that notion). So, Congress gave us Code Section 72(p) for loans made, renegotiated, extended, renewed, or revised after August 13, 1982. After 1982, we had a pretty good idea of what the rules were, but the entire benefits community remained perched on the edge of its collective seat awaiting long-promised guidance from the IRS. Proposed regulations were issued in 1995, and more proposed regulations were issued in 1998. One set of final regulations was issued in July 2000. Those regulations are effective for assignments, pledges, and loans made on or after January 1, 2002. A second set of final regulations was issued in December 2002, effective for assignments, pledges, and loans made on or after January 1, 2004. The second set of final regulations deals with loan payments during military leaves of absence, additional loans taken following a deemed distribution, and refinanced loans.

The basic statutory rules of Code Section 72(p) have been effective since 1982 (with certain modifications in 1986). If in doubt about whether a particular rule applies to a particular loan made in a prior year, refer to the regulations.

Under Code Section 72(p), a loan from a plan to a participant or beneficiary (or a pledge or assignment of accrued benefits by a participant or beneficiary) is treated as a distribution from the plan (a "deemed distribution") unless the loan satisfies the following requirements:

Limitations on Amount

The outstanding balance of all loans may not exceed the lesser of:

- $50,000, reduced by the excess of the highest outstanding balance of loans during the one-year period preceding the loan over the outstanding balance of all loans on the date the loan is made; or
- The greater of 50% of the participant's vested accrued benefit or $10,000.

Repayment Term

The loan must be repaid over a five-year term. There is an exception for loans used to acquire a principal residence. For principal residence loans, the loan must be used to acquire a dwelling unit that will be used as the participant's principal residence within a reasonable time. The term "principal residence" is defined under Code Section 121. The loan is not required to be secured by the dwelling unit. For purposes of determining whether a loan is used to acquire a principal residence, the tracing rules of Code Section 163(h)(3)(B) apply. In general, a refinancing cannot qualify as a principal residence loan.

Level Amortization

The loan, by its terms, must provide for substantially level amortization over the term of the loan, with payments no less frequently than quarterly. The level amortization requirement does not apply for a period of up to one year if a participant is on a *bona fide* leave of absence, either without pay or at a rate of pay that is less than the installments due under the terms of the loan. The leave of absence will not extend the time for repayment (*i.e.,* the loan must still be paid in full within five years), and the amount of the installments due after the leave ends must not be less than required under the terms of the original loan.

A plan may suspend the obligation to repay a loan while a participant is in military service. In this case, the suspension will not cause a loan to be a deemed distribution even if the suspension of repayments exceeds one year and the loan term is extended. Upon completion of military service, however, the loan must be repaid in full by the end of the original loan term extended by the period of military service, and the frequency and amount of installments following military service may not be less than the frequency and amount provided under the terms of the original loan.

Enforceable Agreement

A loan will not satisfy the requirements of the regulations unless evidenced by a legally enforceable agreement and the terms of the agreement demonstrate compliance with Section 72(p)(2) and the regulations. The agreement must specify the amount and date of the loan and the repayment schedule. The agreement does *not* have to be signed if enforceable under applicable law without signature. The agreement must be set forth in either:

- A written paper document; or
- An electronic medium that is reasonably accessible to the participant or beneficiary and is provided under a system that satisfies the following requirements:

(a) Reasonably designed to preclude any unauthorized individual from requesting a loan;

(b) Provides the participant or beneficiary with a reasonable opportunity to review and confirm, modify, or rescind the terms of the loan before the loan is made; and

(c) Provides confirmation of loan terms to a participant or beneficiary within a reasonable time after the loan is made through either a written paper document or an electronic medium reasonably accessible to the participant or beneficiary under a system reasonably designed to provide confirmation in a manner no less understandable than a written document. The participant or beneficiary must also be advised that he or she may request and receive a written paper document at no charge.

If there is an express or tacit understanding that a loan will not be repaid or the transaction is not a *bona fide* loan for any reason, the amount transferred is treated as an actual distribution and not as a loan or deemed distribution.

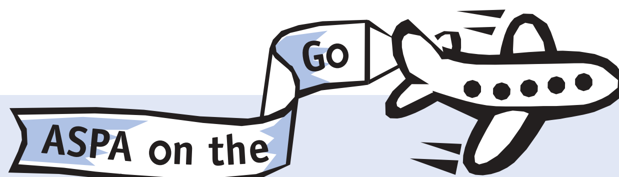
A violation of Code Section 72(p) can occur either because the terms of the loan do not satisfy the Code's requirements or because of a violation of one of the requirements in practice (*e.g.,* the terms of the loan require repayment over 60 months and the participant stops making payments).

Timing of Deemed Distribution

A deemed distribution occurs the first time the requirements set forth above are not satisfied. This may occur at the time of the loan or at a later date. Failure to make any installment payment when due results in a deemed distribution at the time of the failure. However, the plan may permit a "cure period," which cannot extend beyond the last day of the calendar quarter following the calendar quarter in which the payment was due.

Amount of Deemed Distribution

The amount of any deemed distribution depends on which of the Code's requirements were violated. Upon failure to timely pay any installment payment



During the months of March, April, and May, 22 ASPA members assisted ASPA in getting the message to Congress that the President's dividends exclusion proposal will harm small business retirement plan coverage. Each member spoke directly to his or her elected officials about the impact the proposal would have on their businesses if enacted without a fix for small business retirement plans. Stay tuned for the next issue of *The ASPA Journal* and learn more about their experiences.

Delivered the Message	Heard the Message
Thomas D. Hansen, FSPA, and M. Paul Turner, MSPA	Representative J.D. Hayworth (R-AZ 5th)
Burl V. Bachman, MSPA	Representative Eric Cantor (R-VA 7th)
John N. Sample, QKA	Representative Philip English (R-PA 3rd)
Henry J. Garretson, FSPA, Debra A. Levine, CPC, QPA, and Joan E. McCabe, MSPA	Senator Susan Collins (R-ME) Senator Olympia Snowe (R-ME)
John D. Gibson, MSPA, and Sarah E. Simoneaux, CPC	Representative Jim McCrery (R-LA 4th)
John S. Agatston, MSPA, David Lipkin, MSPA, and George J. Taylor, MSPA	Senator Rick Santorum (R-PA)
Becky L. Bock, QPA, QKA, and Susan J. Chambers, FSPA	Senator Jeff Bingaman (D-NM)
Richard L. Billings, CPC, QPA, Stacie L. Brass, CPC, and James L. Kidder, CPC	Senator Charles Grassley (R-IA)
Janet L. Hubber, MSPA	Senator Max Baucus (D-MT)
Irene F. Diamond, CPC, QPA, and Michael R. Miranda	Senator Thomas Daschle (D-SD)
Richard C. Flower, CPC, QPA, Patricia M. Monju, QPA, and Sarah E. Simoneaux, CPC	Senator John Breaux (D-LA)

A special thanks to these ASPA members and all other ASPA members who have either written letters and or have made their voices heard in some way. It does make a difference!

due, the entire outstanding balance of the loan as of the date of the failure, including accrued interest, is treated as a deemed distribution. If only the loan amount limitations are exceeded, only the excess amount is a deemed distribution. However, if any other requirement is not satisfied, the entire amount of the loan is a deemed distribution.

Interest that accrues after a deemed distribution does not result in additional deemed distributions. Interest accruing after a deemed distribution on a loan that has not been repaid is taken into account for purposes of determining the maximum amount available for a subsequent loan.

Tax Consequences of Deemed Distribution

If a loan is treated as a deemed distribution when made, the amount includible in income is subject to income tax withholding. If a deemed distribution or plan loan offset results in taxable income to a participant at a later date, withholding is required only if cash or property is transferred to the participant. Deemed distributions are to be reported on Form 1099-R.

If a participant's account includes after-tax contributions or investment in the contract under Code Section 72(e), all or a portion of the deemed distribution may not be taxable. If a participant repays a loan after a deemed distribution, the participant's tax basis, or investment in the contract, is increased by the amount of the cash repayments made on the loan after the deemed distribution. However, loan repayments are not treated as after-tax contributions for other purposes under the Code.

The 10% excise tax on early distributions under Code Section 72(t) and the 10% excise tax on certain amounts received by 5% owners under Code Section 72(m) apply to deemed distributions. Deemed distributions are not considered impermissible in-service distributions or impermissible distributions under Code Section 401(k). Deemed distributions cannot be rolled over. A deemed distribution is not a correction of a prohibited transaction.

Actual vs. Deemed Distribution

A violation of Code Section 72(p) results in only a "deemed distribution," not an actual distribution, unless the participant's accrued benefit is reduced (offset) to repay the loan. Where there is only a "deemed distribution" and no actual distribution, the deemed distribution results in a taxable event. However, the loan obligation remains in place and the loan must be repaid according to its terms. Whether an actual distribution occurs is determined by the terms of the loan. Note that for some plans an actual distribution could result in plan disqualification!

A distribution of a plan loan offset amount occurs when, under the terms governing a plan loan, the participant's accrued benefit is reduced (or offset) to repay the loan. In the event of a plan loan offset, the amount offset is treated as an actual distribution and not as a deemed distribution. As a result, restrictions on distributions to active employees under Code Sections 401(a) and 401(k) apply.

Refinanced Loans

A participant may refinance a loan or borrow additional amounts if the loans collectively satisfy the limitations on amount under Code Section 72(p)(2)(A), and that the prior loan and the new loan each satisfy the requirements for loan term and level amortization under Code Sections 72(p)(2)(B) and (C). A refinancing includes any situation in which one loan replaces another loan. If a loan is replaced by a second loan and the term of the second loan ends after the term of the original loan, both loans are treated as outstanding on the date of the second loan. This rule does not apply if the terms of the second loan would satisfy Code Section 72(p)(2) and the regulations, if treated as two loans—the original loan, amortized in substantially level payments over the original term; and the second loan, consisting of the difference between the original loan and the second loan. To meet this requirement, the payments on the refinanced loan must not be less than the principal and interest payments required to pay off the first loan within the original five-year term, plus the principal and interest payments required on the additional amount borrowed.

Multiple Loans

The 1998 proposed regulations provided that a loan would be treated as a deemed distribution if two or more loans had previously been made to the participant during the same year. This requirement was dropped in the 2002 final regulations, in response to comments from ASPA and others. However, the plan document may place limits on the number of loans a participant may have outstanding at any one time.

Subsequent Loan Following Deemed Distribution

Following a deemed distribution, no payment by a plan to a participant or beneficiary may be treated as a loan unless it satisfies Code Section 72(p)(2) and the regulations and either:

- There is an enforceable arrangement for repayments by payroll withholding; or
- The participant provides adequate security in addition to the participant's accrued benefit under the plan.

If the foregoing conditions are not satisfied at any time prior to the repayment of the second loan, then the outstanding balance of the second loan is treated as a deemed distribution. For example, if a participant revokes consent to payroll withholding for repayment of

the second loan, the balance of the second loan is treated as a deemed distribution.

Prohibited Transaction Surprises!

The prohibited transaction rules of ERISA and the Code impose sanctions on certain transactions between a plan and a party in interest (under ERISA) or a disqualified person (under the Code). They require that an excise tax penalty be paid to the IRS, that the transaction be corrected, and that the plan be made whole. Under the general rules, a loan from a plan to a participant would be a prohibited transaction. However, a statutory exception to these rules permits such loans so long as each of the following criteria has been satisfied:

- Loans are available to all participants on a reasonably equivalent basis;
- Loans are not available to highly compensated employees in a greater amount than to other participants;
- Loans are made in accordance with specific plan provisions;
- Loans bear a reasonable rate of interest; and
- Loans are adequately secured.

The DOL issued regulations in July 1989, interpreting this exemption from the prohibited transaction rules applicable to loans granted or renewed after October 18, 1989. A detailed discussion of these rules is beyond the scope of this article. However, we will point out the following:

- A participant loan that is secured by the participant's account balance and violates the prohibited transaction rules can result in the disqualification of the plan (because the Code only permits an account balance to be used as collateral for a loan if the loan is exempt from the prohibited transaction rules).
- Although a plan document need not contain the restrictions of Code Section 72(p), if it does and they are violated, a prohibited transaction may have occurred because the loan was not made in accordance with the plan's provisions.
- The plan's loan provisions must satisfy the DOL's criteria.

You should also be aware that a loan made by a plan to a participant may cause plan qualification problems separate and apart from the prohibited transaction rules if the loan is made without authorizing language in the plan. Why? Because you have failed to operate the plan in accordance with the plan documents.

What To Do?

We recommend that each plan's advisers undertake a thorough compliance review of the plan's outstanding loans, the plan's loan provisions and procedures, and the loan documents being used. Are Code Section 72(p) violations occurring? If so, are they being reported properly? How are you handling "defaults?" Is the wording in your plan's loan documents the best it can be in view of these rules? Are your plan's loan documents a problem in and of themselves? Are prohibited transactions occurring? ▲

James C. Paul, APM, Esq., is a shareholder of Chang Ruthenberg & Long PC, an employee benefits law firm. Jim's practice includes working with qualified retirement plans, nonqualified deferred compensation plans, welfare plans, stock based compensation plans, and all aspects of employee benefits law. His experience includes pension and welfare benefits litigation, fiduciary litigation, and representation of Taft-Hartley trust funds. Jim is the current chair of the ASPA IRS subcommittee and he frequently speaks and writes on employee benefits issues.

Kenneth W. Ruthenberg, Jr., Esq., is the managing shareholder of the Sacramento employee benefits law firm of Chang, Ruthenberg & Long. Ken has served as an adjunct professor in McGeorge Law School's LLM (Tax) program and in Golden Gate University's Masters of Taxation program. He has practiced employee benefits law almost exclusively for over 20 years, is a former chairman of the Employee Benefits Committee of the Taxation Section of the State Bar of California, is a co-author of the Business Owner's Retirement Plan Survival Guide*, and was recently inducted as a fellow of the American College Of Employee Benefits Counsel.*

Nominations Open for ASPA's Board of Directors

For ASPA to continue to be the effective organization that it is, active participation by all of our credentialed members is essential. We need good strong people with differing perspectives to help lead our organization.

If you or someone you know would be a valuable addition to our Board, now is the time to begin the nomination process.

To be considered for a Board position, a nomination form for a credentialed member must be submitted to the Nominating Committee Chair, the immediate Past President, Craig P. Hoffman, APM, at least 60 days prior to the October 27 Annual Business Meeting (*i.e.*, August 27, 2003).

A nomination form is included with this copy of *The ASPA Journal*, and you may also access the form on the Members Only portion of our Web site at www.aspa.org.

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A View From Above the Summit: An Attendee's Perspective of the 401(k) Sales Summit

is said that nearly 85% of information heard at a conference is lost in the first 48 hours. Outlines can be helpful to reinforce the ideas presented.

Based on conversations with some of the people who donated their time to help put on the program, there was disappointment at the number of people returning the feedback surveys, which was very low in 2002 and was likely the same for the 2003 Summit. Perhaps it is that salesperson and paperwork thing again. In developing conferences like the Sales Summit, input from attendees is relied upon very heavily to shape future programs. I was pleased to discover that some of my 2002 comments were taken to heart and used to help develop the 2003 Summit.

Something new at the 2003 Summit was that prior to the start of the conference, several of the insurance carriers offered Insurance Continuing Education Programs for four hours of classroom credit. These classes were of particular interest to many of the attendees from my great home state of Texas. This year Texas initiated a requirement that of the 30 hours of continuing education to maintain an insurance license, 15 of those hours must be in the classroom. Additionally, prior to the start of the conference, several of the sponsors offered sales and marketing sessions. These preconference programs gave many of the early arrivals something constructive to do with their time and gave the sponsors a chance to tout their products to an interested group of prospects.

Of course, it would be all but impossible to put on any conference without corporate sponsors. Sponsors help foot the bill to bring in some of the speakers and sponsor everything from conference bags, luncheons, snack breaks, happy hours, and breakfasts. (They have yet to sponsor signage or recorded messages in the restroom, but there is always next year.) Their representatives manning the booths worked longer and harder than anyone else at the conference. They were there for the early morning risers at the crack of dawn, and entertained us well into the night. All day long, they stood watch at their tables and booths to promote their products and demonstrate market differentiation. The best promotion I saw to keep the attention of a prospect was the shoeshine booth, sponsored by American Express. While you were in the chair, they had your undivided attention, and what self-respecting salesperson can resist a free shoeshine?

For me, the most enjoyable, motivational, and memorable part of the 2003 Sales Summit was the keynote presentation by Alan Hobson—"Conquering Mountains," sponsored by Liberty Funds. It took Mr. Hobson and his team three attempts before Mt. Everest let them get to the top. On the first attempt, their base camp was blown off the side of the mountain in a freak storm. On the second attempt, one of the members of the expedition got within two city blocks of the top before being forced by exhaustion to turn back and be rescued from certain death by the other members of the expedition. Mr. Hobson pointed out that 40% of the people who die on Everest do make it to the top, but are so exhausted that they die on the descent (which, by the way, is not considered a successful expedition.) Alan and his team believed that their second attempt *was* successful, at least in their own eyes, because they were able to save the life of their friend; the world, however, viewed the attempt as a failure. Finally, on the third attempt, Alan and his team were successful in the ascent of Everest. Over five years of preparation for about fifteen minutes on top of the world—how is that for delayed gratification? It was interesting to note that Mr. Hobson spent much more time talking about the two failed attempts up Mt. Everest than he did about the successful third ascent. It really demonstrates that it is the journey that is important, not the destination. On returning from the third and successful ascent of Everest, Mr. Hobson learned he had cancer and he began his greatest battle—the one for his life.

Mr. Hobson used the same proven technique that he used to get to the top of Mt. Everest in his battle with cancer. His mantra of "Can, Will" to climb Everest was now directed against his cancer. First and foremost, Mr. Hobson stresses teamwork, planning, preparation, and finally, execution. It was a delight to hear that Mr. Hobson is cancer free and is taking his message of hope and techniques to fight back to other cancer victims. Whenever you have the opportunity to hear a story like Mr. Hobson's, especially firsthand, it lightens your own burdens and intensifies your resolve to pursue the greater good.

Another memorable moment of the conference was to hear the speech of Nobel Prize winner Dr. Harry M. Markowitz, the originator of Modern Portfolio Theory, sponsored by GuidedChoice.com. From the looks on the faces of the attendees, I venture to say that Dr. Markowitz's watered down presentation on Modern Portfolio Theory at 50 was over the heads of most, yet still fascinating.

In all, I believe the conference was a huge success and I encourage all to attend the 2004 program. As promised, I'll end with a sales story. After attending the 2003 Sales Summit, I decided to spend more time with top salespeople to learn what they did to be successful so I could model that behavior to get the same results. Here is a result of that effort.

On a recent client visit, I had the opportunity to meet with a top Harley-Davidson salesman, Joel Brown. Although he was initially reluctant to meet with me, when I told him the purpose of my visit (for me to become a top sales person like him), he agreed to give me ten minutes, which turned into a 45-minute conversation and a new friendship.

In short, he gave me the following points that are successful in selling any goods or services. (Prior to selling Harleys, he was an investment banker with Morgan Stanley.)

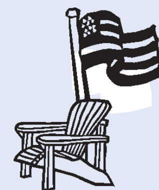
- *Always keep a good supply of prospects in the hopper.* Sales is a numbers game. To make more sales, see more people. If you do not have a lot of prospects in the hopper, your business will not prosper.
- *Work all the time you're at work.* Too many people, especially sales people, use their time at work as an extended social hour by continuously taking "breaks." Joel really does work seven days a week.
- *Product knowledge, product knowledge, product knowledge.* Joel contends that your health, wealth, and happiness are in direct proportion to your ability to solve problems. Only by knowing your product inside and out can you know how it can be best applied to suit your prospect's needs. The biggest problem that keeps people from owning a Harley is financing. Therefore, Joel knows financing inside out to help his clients get the motorcycle of their dreams.
- *Trust.* Ninety percent of Joel's sales come in over the phone and Internet, with people buying bikes sight unseen. He must not only know his product, his clients must believe he is working in their best interest.
- *Action exercise.* Ask yourself…What is the greatest problem or obstacle that my prospects or clients face and how can my services be structured to solve that problem?

I wish you success in your selling efforts. ▲

Jay Thomas Scholz, CPC, QPA, QKA, has been a member of ASPA since 1986. Joel is the director of enlightened retirement at The Padgett Benefit Group, LP, in San Antonio, TX. He is a frequent speaker and author on retirement issues. The Padgett Benefit Group, LP, is a retirement service organization committed to making a positive difference for their employees, clients, and community. His team provides plan consulting, administrative services, and documentation for clients in South Texas. They market primarily through brokers and other financial intermediaries.

A Day at the Beach

by Chris L. Stroud, MSPA



As I stare across the ocean wide,
My prayers go out along with the tide
To those who are fighting for us to be free—
And to those who have died and their families.

I breathe deeply and inhale the fresh salt air
And I wonder if there's fire and smoke over there.
Then I watch some children splash and play—
And I hope that their parents are not far away.

As I press my toes down into the sand,
I give thanks that I live in this great land.
Then I think how our soldiers, far away, must feel—
That sandstorms are brutal and war is too real.

As I rest in the warmth of the glowing sun,
I'm in hopes that their job is nearly done.
They are likely too hot and too tired, yet still
They continue to fight—I admire their will!

As the sounds of the crashing waves draw near
I'm reminded of the gunshots and explosions they hear.
Then I sip my drink and have some snacks—
And I think of the MREs in their packs.

The sun is setting—there's a chill in the air.
As I pack up my bag and reach for my chair,
I pray that Victory is within their reach.
For me, it was just another day at the beach.

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Comments on Reductions of Accruals and Allocations Because of the Attainment of Any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans

proposed regulation includes examples [see, proposed regulation §1.411(b)-2(b)(3)(iii), Example 12] that demonstrate that a formula that is acceptable in a plan requiring suspension of benefits can suddenly fail the year-by-year rule solely because of the actuarial increase.

The concern that the proposed approach to post normal retirement date actuarial increases can lead to plan design errors is illustrated by Example 11 in proposed regulation §1.411(b)-2(b)(3)(iii). Consider an employee with 15 years of service. The actuarially increased benefit for an employee age 66 is $627.50, while the age 65 benefit would have been $560 ($40 x 14). The resulting increase is $67.50. On the other hand, if the participant were age 80, the $40 plan formula would produce a benefit larger than a benefit at NRA of $0, actuarially increased. If the 80 year old had been younger, the actuarial increases would have produced a larger accrual, such as the $67.50 credited to the participant who is 66. Contrary to the statement made in the example, this plan fails the bright line test established by the proposed rule.

ASPA recommends plan sponsors be given the option of ignoring actuarial increases after the plan's normal retirement date in testing compliance with Section 411(b)(1)(H).

Multiple Formulas

Plans sponsors should be able to provide multiple formulas in a single plan. Plan formulas often can be alternatively expressed as the sum of, or the better of, two or more provisions, each of which is acceptable under the proposed regulations. The final regulations should allow a plan to be analyzed as a combination of two or more formulas regardless of whether or not the combination involves different plan types (*e.g.,* cash balance and traditional).

The concept that a design is nondiscriminatory if it could have been done in separate plans was embraced in the development of the Section 401(a)(4) nondiscrimination rules. Thus, for example, employers can provide various levels of benefits for salaried employees in the same plan as employees for whom benefits are collectively bargained. The Section 401(a)(4) regulations went further still by memorializing three "wearaway" rules for transitioning from one plan formula to another. Floor-offset plans also support the concept that "greater of" designs have long been viewed as acceptable (note that each participant in a floor-offset design gets whichever of the two benefits—gross defined benefit or defined contribution—is better).

The ability to combine or split out elements of formulas into separate pieces should lead to reasonable approaches for dealing with special circumstances that are not otherwise addressed by the proposed rule. Final rules need to address:

- Floor offset plans,
- Traditional plan amendments with Section 411(d)(6) protected benefits,
- Plans with multiple formulas for the same group,
- Plans with multiple formulas for different groups of employees,
- Employees transferred from a group covered by one formula to a group covered by another plan type,
- Employees who make an election to be covered by one formula or another, where one or both formulas are amended after the election date, and
- Plans with different normal retirement ages for different groups of employees.

ASPA recommends that a benefit be considered nondiscriminatory if it is the sum of, or the greater of, two or more formulas where each underlying formula is nondiscriminatory. Furthermore, it should be permissible to aggregate and disaggregate plans for purpose of testing for age discrimination.

ASPA further recommends that final age nondiscrimination rules include a facts and circumstances safety valve that can be triggered by a specific request to the Commissioner. Proposed regulation §1.411(b)-2(b)(3)(i) states that plans must satisfy the requirements not only for the actual participants but also for any potential participants. ASPA is concerned that this requirement might be unreasonable, particularly in the case of closed groups.

Pension Equity Plans

Under the typical pension equity plan, a participant's retirement benefit is a function of his or her years of service, multiplied by a percentage of final average compensation that frequently increases with years of participation. No interest credit applies in most pension

equity plans. Instead, the benefit tends to increase over the participant's career due to increasing years of participation or service and increases in final average pay. Ignoring the impact of pay changes, the benefit accrues in annual units that are equal when measured in terms of the current value of the expected pension benefit, not in terms of the amount of pension to be provided. The participant's benefit is converted to an actuarial equivalent annuity commencing at normal retirement age when he or she leaves employment.

A pension equity plan design will not pass the proposed regulation's test for traditional plan designs because the traditional plan test focuses on the increase in the normal retirement benefit even if the plan's normal form of benefit is not a normal retirement annuity (as in a pension equity plan). Similar to a traditional cash balance plan, the pension equity plan provides a normal retirement benefit for a younger participant that will be greater than the normal retirement benefit of a similarly situated older participant simply because of the greater number of years between current age and normal retirement age at the time of termination. Thus, the pension equity plan fails to satisfy the traditional plan age discrimination requirement for the very same reason that a cash balance plan would fail.

Many pension equity plan designs also will fail to satisfy the eligible cash balance option due to the requirement in the definition of "eligible cash balance plans" in proposed regulation §1.411(b)-2(b)(2)(iii)(B) that a participant's hypothetical account balance have a right to annual interest credits for all future periods. Crediting interest to the hypothetical account is not an indicator of age discrimination. Moreover, a pension equity plan design could be viewed as being less age discriminatory than a typical cash balance plan, in that a cash balance plan's guaranteed right to future interest credits favors younger participants whereas account growth in a pension equity plan is tied to growth in final average pay. Therefore, final age discrimination regulations should recognize that accruals under pension equity plans are satisfactory.

ASPA recommends that the Service issue guidance confirming that pension equity plans that could have satisfied Section 411(b)(1)(H) if reasonable interest credits had replaced pay change adjustments are deemed to satisfy Section 411(b)(1)(H).

Traditional Plans

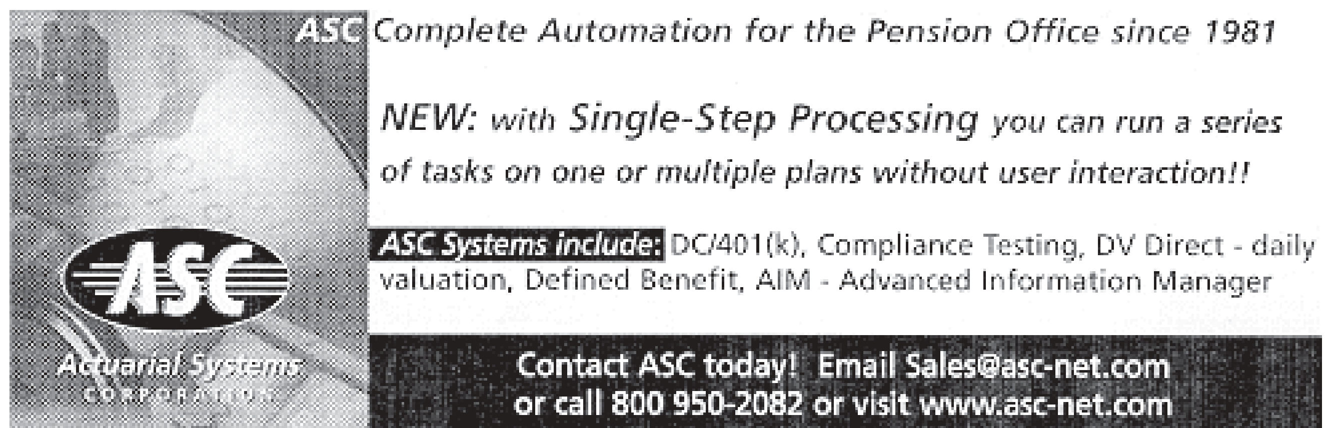
Benefit Design

As currently structured, the proposed age discrimination rules would call into question the legitimacy of many widespread "traditional" plan designs including PIA offset plans, plans that use participation-based fractional accrual with a service-based formula, plans mimicking Social Security, contributory plans, floor-offset plans, and plans offset by traditional benefits in paired plans.

The problem that exists with these plan designs is due to the arbitrary application of a plan year-to-plan year measurement period in the proposed regulations, and because actuarial adjustments in excess of what a suspension of benefits rule would allow are provided. Such issues can be solved by permitting plan aggregation and use of a "whichever benefit is better" approach.

Any rule that punishes the employer who returns the value of interest and mortality benefits to employees is undesirable. An actuarial adjustment should not be treated as an additional benefit. It is meant to compensate for the value lost by the participant because the benefit does not commence at the normal date, comparable to the investment experience of a participant in a defined contribution plan.

The calculation of a one-year increase in a plan that provides full value on death is simply the present value



at age 1, times 1 plus the interest rate (note the parallelism to defined contribution of 1 plus investment return rate), with the resulting present value divided by an annuity factor at age 2 (which is how a defined contribution account balance would be converted to an annuity benefit). If it were not for the specific statutory rule offering an exception to permit using this

ASPA recommends that the annual accrual test and approach to actuarial increases be reconsidered and made just one of several permitted alternatives.

increase as an offset, plans would have to provide both the increase and the fresh accrual because this is not an additional benefit. Because it is not an additional benefit, it does not lead to the creation of an age discriminatory pattern.

ASPA recommends that the annual accrual test and approach to actuarial increases be reconsidered and made just one of several permitted alternatives.

Offsets for Distributions

There is merit to using the benefit that would have been payable in the normal form to determine the adjustments to ongoing accruals in the normal form. However, as with plans that provide an actuarial increase in lieu of a suspension of benefits, the proposed regulations use of an approach of limiting the offset in any year to the value of the benefit paid in the year (in its life only form), rather than basing it on the accumulated payments, is not supported by statute. The result for these situations should be comparable to the rule for plans (or participants) that defer benefit commencement. An additional accrual occurs when, and to the extent, the benefit under the plan's formula exceeds the previously accrued benefit with actuarial increase (or presumed increase in the case of participant actually in receipt of benefits).

The final rule should clarify that the offsets dealt with in this regulation are separate and apart from offsets to the accrued benefit to prevent duplication of benefits. Clearly, the accrued benefit of a participant who leaves employment prior to normal retirement and receives a lump sum or receives annuity payments prior to returning to employment and earning additional benefit accruals is not the same as the accrued benefit of a participant with the same formula accrual who did not receive payments. At normal retirement, the accrued benefit of the individual who left and returned is just the net benefit under the plan's nonduplication of benefit clause.

ASPA recommends that final rules observe this distinction and explain how the two rules interrelate.

These comments have been prepared principally by Edward Burrows, Lawrence Deutsch, and Marjorie Martin of the Actuarial Subcommittee of ASPA's Government Affairs Committee and Fred Singerman. We appreciate the opportunity to provide these comments, and are available to discuss them with you further. ▲

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Fredric S. Singerman, Esq., with Seyfarth Shaw in Washington, DC, practices all aspects of qualified retirement plan design, establishment, amendment, and termination. He is familiar with the issues arising under cash balance, pension equity, and other sophisticated qualified plan designs. A major component of Fred's practice relates to non-qualified retirement plans and executive compensation issues, including stock option plans, SERPs, and executive employment agreements. He also advises on litigation arising under ERISA. He is co-chair of his firm's HIPAA Task Force and was appointed by President Clinton as a delegate to the 1998 National Summit on Retirement Savings.

Continued from page 8

Davis-Bacon Prevailing Wage Retirement Plans

Determining the Prevailing Wage

In order to understand Davis-Bacon retirement plans, it is important to understand how Davis-Bacon works. The overall prevailing wage is determined based on specific categories of workers and is set by the Wage and Hour Division of the US Department of Labor. It is important to note that 35 states also have state prevailing wage programs that impact the pricing of state contracts. A good source of information regarding state Davis-Bacon laws (broken down by counties) is http://www.access.gpo.gov/davisbacon/allstates.html.

The Wage and Hour Division also releases modifications to wage determination. These are generally the result of competitive bidding and are published in the Federal Register no more than 10 days before the opening of bids on a particular project. Also, there is a wage determination referred to as a project wage determination, which is issued at the specific request of a contractor. The contractor applies to the Wage and Hour Division for the determination using Form 308. The Wage and Hour Division will then respond with applicable wages. The wages are applicable to the specific project only and will expire 180 calendar days from the date of issuance, unless the contractor requests an extension of the expiration date and the extension is approved by the Wage and Hour Division.

The Davis-Bacon prevailing wage requirements apply to the construction, alteration, and/or repair of public buildings or public works of the United States or District of Columbia within the geographic limits of the states of the union or the District of Columbia. It does not apply to federal construction contracts in Guam, Puerto Rico, the Virgin Islands, or other territories. However, some related acts, which provide federal assistant to local government bodies in the territories, do require the payment of Davis-Bacon wages.

In general, the Davis-Bacon Act applies to all mechanics and laborers employed on a job site, whether employed by a contractor or subcontractor. A laborer is defined to mean anyone whose duties are manual labor or physical in nature, as distinguished from managerial. A mechanic is any skilled worker who uses tools or who is performing the work of a trade. To the extent that the owner of a company or his or her family

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members are performing covered work, they are not exempt from the prevailing wage. Davis-Bacon does not apply to workers whose duties are primarily administrative, executive, or clerical. However, foremen who devote more than 20 percent of their time during a workweek to mechanical or laborer duties are laborers and mechanics for the time so spent. Apprentices, trainees, and helpers considered laborers and mechanics are included in the definition of laborer or mechanic.

The term jobsite is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed, or other adjacent or nearby property used by the contractor or subcontractor in such construction that can reasonably be said to be included in the site (*i.e.,* fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, and tool yards), provided that they are all dedicated exclusively, or nearly so, to performance of the contract. These locations must also be located in reasonable proximity to the actual construction location. Not included in the jobsite are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined without regard to a particular federal or federally assisted project.

Transportation between the actual construction location and a facility off-site, which is dedicated to the construction project covered by the Davis-Bacon Act, is deemed to be part of the site of the work and is covered by the Act.

Davis-Bacon wages apply only when an individual is working on a government contract that is in excess of $2,000. As a result, an employee may have Davis-Bacon wages and regular wages as a part of his or her total compensation package. It is essential that the Davis-Bacon wages be tracked separately. By law, the contractor must certify payroll to the Wage and Hour Division. Failure to comply can result in civil penalties, contract forfeiture, and exclusion from future Davis-Bacon Act projects. The Davis-Bacon Act specifically requires retention of employee demographic information and compensation records for three years.

Davis-Bacon Retirement Plans

Due to the nature of the construction industry, a worker may have Davis-Bacon wages and non-Davis-Bacon wages resulting in two different types of contributions. The retirement plan contributions made from Davis-Bacon fringe compensation amounts must be tracked separately to properly certify the payroll as required under the Davis-Bacon Act. The Davis-Bacon amounts earmarked for retirement can be contributed to a separate retirement plan or contributed to any individual account retirement plan. There are advantages and disadvantages to either approach and the appropriate design is up to the contractor. A separate Davis-Bacon plan is more straightforward. However, it may be more cost effective to operate a single plan.

There are no specific retirement plan rules within the Code for Davis-Bacon retirement plans. A Davis-Bacon plan is treated just like any other qualified plan, subject to all of the qualification requirements set forth in Code Section 401(a). It is important to remember that Davis-Bacon workers are not union employees, therefore, there are no special exceptions for Davis-Bacon workers within the coverage or nondiscrimination rules of Code Section 410(b) or 401(a)(4). It is especially important to remember that testing compensation under Code Section 414(s) includes both Davis-Bacon and non-Davis-Bacon wages.

From a practical perspective, there are certain plan features that coordinate better with the prevailing wage guidelines. For example, while technically permissible, a defined benefit plan funded with Davis-Bacon contributions is rare. Under the federal Davis-Bacon Act, designing the Davis-Bacon feature with immediate eligibility and full vesting avoids the need to annualize. Annualization is the concept of basing Davis-Bacon plan contributions to a qualified retirement plan based on an effective annual rate of contributions for all hours worked (on both Davis-Bacon and non-Davis-Bacon projects). Certain state Davis-Bacon acts require annualization in all instances. The US Department of Labor's Davis-Bacon Resource Book (11/2002) states that unless a defined contribution pension plan provides for immediate participation and immediate, or essentially immediate, vesting schedules (100% vesting after 500 hours of service), the Davis-Bacon contribution must be annualized.

For example, assume that a contribution for an employee under a money purchase plan is $2,000. Assume also that Davis-Bacon fringe compensation for this individual is $1,500, based on 500 hours of Davis-Bacon work. And assume the employee worked a total of 1,000 hours of service. In order for the contractor to meet its obligation with respect to the Davis-Bacon wages, only $1,000 of the $2,000 contribution can be funded with Davis-Bacon fringe benefit dollars. The other $1,000 would need to be contributed by the employer.

Contributions must be made not less often than quarterly, which differs from the rules that apply to 401(k) elective deferrals as well as other employer contributions. In addition, the plan design cannot require a requisite number of hours of service or last day employment provision.

An employee who receives Davis-Bacon wages may also have non Davis-Bacon wages payable in the same year. The Davis-Bacon fringe piece translates into the minimum amount you can pay a Davis-Bacon worker in the form of fringe benefits. In many cases, the contractor is already providing a benefit package including a qualified plan. The Davis-Bacon amounts can offset any other allocation that may be provided under the plan provided they are not restricted by the annualization rules described above.

For example, assume that Bob, Bill, and Ben are employed by Bob's Bridge Builders. The contractor maintains a 10% money purchase plan that includes a Davis-Bacon feature. The Davis-Bacon feature is designed to offset any required money purchase contribution. In the 2002 plan year, Bob earns $200,000, none of which is Davis-Bacon wages; Bill's compensation totals $50,000, of which $25,000 is Davis-Bacon wages; and Ben earns $30,000, of which $10,000 (400 hours) is Davis-Bacon work. Further assume that the Davis-Bacon fringe piece was $6.00 per hour, and Bill had 1,000 Davis-Bacon hours of service, resulting in a $6,000 contribution for Bill ($6 x 1,000) and $2,400 for Ben ($6 x 400). The $6 Davis-Bacon fringe piece equates to 12% of Bill's total compensation ($6,000/$50,000), but only 8% in Ben's case ($2,400/$30,000). Therefore, under this design, Bill's $6,000 Davis-Bacon contribution could do double duty—it could satisfy the contractor's Davis-Bacon obligation and could also offset the otherwise required contribution. This scenario holds true even though the money purchase contribution is based on total compensation and the Davis-Bacon fringe contribution is based only on hours of service on Davis-Bacon projects. The extra $1,000 of Davis-Bacon contributions would remain in the plan. On the other hand, Ben's contribution satisfies the Davis-Bacon obligation, but is not sufficient to fund the money purchase contribution. The employer would need to contribute an additional $600. It is also important to point out in this example that if the plan did not provide 100% vesting and immediate eligibility, the contractor would only be able to apply Bill's $6,000 towards his $25,000 of Davis-Bacon wages, in which case the contractor would need to contribute an additional $2,500 on Bill's behalf.

Davis-Bacon workers are similar to union employees in that their tenure at a particular company may be short. In the collectively bargained arena, multi-employer plans permit an employee to work for several different employers within the same industry with continuous service. However, Davis-Bacon plans are not subject to the multi-employer rules since the employment is not governed by a collective bargaining agreement. Therefore, it becomes essential to keep complete and accurate records of all Davis-Bacon hours. Because of the tenuous nature of construction work, one area of particular concern with Davis-Bacon plans is the determination of when a separation from service actually occurs. A worker may be laid-off for a period of time and then reemployed during the construction season. There are no clear-cut guidelines as to when or if a separation of service occurs in this situation. Therefore, care should be taken to make sure that all participants are handled in the same manner. To the extent that the contractor knows that the employee will return after a layoff, the situation should probably be treated as unpaid leave as opposed to a separation from service, especially if the contractor pays for any benefits during any layoff periods.

Prior to EGTRRA, IRC §415 violations were a common occurrence in Davis-Bacon plans because the contribution to the plan was based on the prevailing wage and had no direct relationship to a participant's total compensation earned for the year. Unlike a traditional retirement plan where annual additions can be held in suspense and/or reallocated to other participants, if a Davis-Bacon participant incurred an annual addition violation, that amount would need to be paid directly to the participant giving rise to additional taxable compensation and additional payroll taxes to be paid by the contractor. Thankfully, the increased §415 annual addition limitation will prevent most annual addition violations.

Are You a Pension Expert and a Teacher at Heart?

If so, ASPA has unlimited opportunities for you! ASPA is looking for instructors for webcasts and Web courses. Proposals for webcasts can be any timely or timeless topic of your choosing that you think would be important to ASPA members and to the retirement plan industry. Webcasts are 100 minutes in length.

ASPA is actively pursuing instructors who are familiar with ASPA's education program to teach one or more topic(s) covered by one of the exams. An easy way to begin thinking about ways you can participate is to look at the table of contents for one of the study guides, choose a subject, and start an outline. Web courses should be divided into 10 to 13 100-minute segments.

ASPA takes care of the webcast/Web course set-up and offers a small honorarium for instructors who are chosen to participate. For more information, or to submit your outline of ideas, contact Jane Grimm, Managing Director, at (703) 516-9300 x106 or **jgrimm@aspa.org**.

What remains a trouble spot is the 404 deductible limitation. Although EGTRRA raised the limit in a profit sharing plan from 15% of net compensation to 25% of gross compensation, it is possible to exceed this limitation in which case it would be necessary to assure that the covered worker receive a combination of wages and benefits sufficient to meet the mandated compensation package.

Coverage and nondiscrimination testing remain problematic for Davis-Bacon plans. Remember, these workers are not union employees, therefore unless the workers qualify for an age or service exemption, they are not considered to be statutory exclusions. All of the 401(a)(4) nondiscrimination rules apply to Davis-Bacon employees and Davis-Bacon prevailing wages may apply to an owner or other highly compensated employee working in a non-managerial role. An HCE receiving a significant Davis-Bacon contribution can cause the plan to fail nondiscrimination testing. In some cases, Davis-Bacon amounts can be helpful when general testing, especially in a cross-tested plan where non-highly compensated employees receive significant Davis-Bacon contributions that can be used as the allocation gateway as well as for part of the cross-tested benefit. Remember, any corrective methodology used to pass a failed nondiscrimination test cannot result in the Davis-Bacon employee forfeiting any of his or her Davis-Bacon contributions. What is even more complicated is that the non-owner definition of HCE is based on the prior plan year. It is very important to identify all HCEs carefully. The volatile nature of the construction industry could create HCE disparity from year-to-year.

> *You may want to contact property and casualty agents in your area and jointly market Davis-Bacon plans with a focus on the savings to the contractor.*

Davis-Bacon is not the only prevailing wage law. The Service Contract Act (aka The McNamara-O'Hara Service Contract Act) requires the payment of specified minimum wage rates and fringe benefits to employees working on service contracts and government subcontracts. As part of the Service Contracts Act, there is a required fringe benefit of $2.56 an hour. These benefits generally apply to low paid workers who perform services in government buildings on a contract basis (*i.e.,* cafeteria workers, cleaning and janitorial services).

Conclusion

Implementation of a qualified retirement plan to use the fringe benefit component of Davis-Bacon required minimum wages supports public policy with respect to preparing Americans for retirement and results in tax and insurance benefits to the contractor. Remember, in all these prevailing wage programs, all amounts paid in cash instead of benefits become taxable compensation subject to all payroll taxes and are applicable in determining workers' compensation rates. Implementation of a retirement program not only establishes a valuable benefit for employees, but it also provides significant payroll cost savings for the contractor.

The larger the job, the larger the savings. Marketing the plan from this perspective is a unique approach. In fact, you may want to contact property and casualty agents in your area and jointly market Davis-Bacon plans with a focus on the savings to the contractor. Some contractors may argue that they must pay the fringe piece as compensation in order to retain good workers. In those cases, a plan designed with liberal withdrawal rights and loan provisions could serve double duty. The Davis-Bacon contributions could serve as the foundation for some aggressive plan design that benefits the owners, while at the same time benefiting the Davis-Bacon workers, especially during layoffs, if the plan includes loan and hardship withdrawal provisions. Technically, as long as the premium amount does not exceed 25 percent of the aggregate contributions, a participant could earmark part of his retirement account for health and disability insurance. These types of plan designs can get tricky and, to the extent the plan is designed in an overly aggressive manner, may fall short of the overall qualification requirement that it be maintained primarily for the purpose of providing retirement benefits for participants and their beneficiaries. Nonetheless, prevailing wage plan design can yield interesting and creative consulting opportunities. ▲

Amy Cavanaugh, CPC, QPA, QKA, is a pension consultant with McKay Hochman with over 20 years of pension experience. Amy is the Publications Chair for ASPA's Education and Examination Committee and serves on The ASPA Journal Committee. She is a columnist for the BenefitsLink Davis–Bacon Q&A column. She is also the co-author of the Coverage and Nondiscrimination Answer Book *published by Panel Publishers.*

The Purpose of ASPA's Political Action Committee (ASPA PAC)

by Fred Reish, APM

I HAVE BEEN ACTIVELY INVOLVED IN ASPA SINCE THE LATE 1980S. IT SEEMS LIKE, FOR ALL OF THOSE 15 YEARS, THERE HAS BEEN AN IMPORTANT NEED FOR ASPA TO MAINTAIN CLOSE WORKING RELATIONSHIPS WITH CONGRESSIONAL LEGISLATORS, WHITEHOUSE POLICYMAKERS, AND AGENCY REGULATORS.

At times, there have been fights. For example, the ASPA Government Affairs Committee (GAC) fought successfully in the "war" on the actuarial audits. At times, it has been in the spirit of cooperation. Because of our access to the IRS and the Treasury Department, GAC was able to preserve the tiered allocation methodology for cross-tested plans, and was able to illustrate the need for contributions to safe harbor 401(k) plans to be used for cross-testing.

However, the most significant changes to our industry—both positive and negative—come out of Congress. Rather than dealing with the every day work of interpreting and enforcing laws, Congress makes the laws—leaving it to the agencies to refine and explain them…but only within the context of the law.

A bad law can hurt our clients, complicate our businesses, or even lead to the termination of a significant number of plans. A good law can create design opportunities, ease administrative work, and result in the formation of new plans.

The purpose of the ASPA PAC is to encourage the making of good laws and to discourage bad legislation. For our purposes, good laws are those that promote the formation of qualified retirement plans, improve the ability of employers and ASPA's members to customize the design of plans to meet employers' particular needs, and improve the quality of benefits for all employees. Bad laws are those that add excessive expense or unneeded complexity or that increase the burdens on employers to the point that it would cause the abandonment of plans or the reduction of benefits for employees.

A by-product of good laws is that ASPA's members benefit. They benefit because:

- More plans are formed, which require administrative and other services.
- Those plans provide quality benefits at a reasonable cost, which should result in greater satisfaction and retention.
- Where needed, plans could be customized for the needs of the employers, resulting in consulting work for ASPA's members.

In effect, ASPA's members could do well while doing good.

How does the ASPA PAC accomplish those goals?

The answer is straightforward. There are a limited number of members of Congress who understand and support the private retirement system. Their goals are aligned with ours. ASPA PAC contributes to them to help ensure that they continue to be re-elected. In addition, both ASPA PAC and GAC educate those members of Congress on new ideas and the impact of various proposals—as well as helping with the specific wording of proposed legislation.

How can you do that? It's easy; support the ASPA PAC!

The first step is to start contributing. It doesn't matter whether you contribute $25 or $500—just do what you are comfortable with…and become a member of ASPA PAC. You can do that by going to the Government Affairs section on ASPA's Web site at **www.aspa.org**.

Do it now. Start making a difference in the laws that affect you!

We all have a choice…we can wait until laws are passed and then deal with them, or we can shape our futures by being part of the action. My choice is to be in the game, rather than to sit in the stands. I hope that's your choice, too. ▲

Fred Reish, APM, Esq., is a founder and partner of the Los Angeles law firm Reish Luftman McDaniel & Reicher. He is a former co-chair of ASPA's Government Affairs Committee and is currently the chair of GAC's 401(k) Fiduciary Task Force.

ASPA Government Affairs Committee Meets with IRS Representatives

by James C. Paul, APM

REPRESENTATIVES OF ASPA'S GOVERNMENT AFFAIRS COMMITTEE (GAC) MET WITH IRS REPRESENTATIVES, INCLUDING PAUL SHULTZ, RICHARD WICKERSHAM, AND JIM HOLLAND, ON JANUARY 29, 2003, TO DISCUSS CURRENT ISSUES OF INTEREST TO ASPA MEMBERS.

Required Minimum Distributions For DB Plans: IRS recently issued Revenue Procedure 2003-10 and Notice 2003-2, postponing the deadline for amending defined benefit plans to comply with minimum distribution rules under Code Section 401(a)(9) and providing transition relief for certain provisions issued as temporary regulations (See *ASPA ASAP* 02-30). Most notably, these pronouncements provide more time for IRS to consider whether defined benefit plans using the "account balance method" to calculate required minimum distributions should be permitted to continue using that method.

The IRS guidance left two issues unclear. First, Rev. Proc. 2003-10 does not clearly state whether defined benefit plans must adopt a good faith amendment to reflect plan operation by the end of the year in which new rules become effective, as required under prior EGTRRA guidance. IRS has now confirmed that defined benefit plans do not have to adopt good faith amendments to reflect plan operations under Rev. Proc. 2003-10 and Notice 2003-2 prior to the end of the EGTRRA remedial amendment period (generally not sooner than the last day of the 2005 plan year; see Notice 2001-42).

Secondly, Rev. Proc. 2003-10 does not clearly state whether defined benefit plans that were previously amended to conform with Final, Temporary, and Proposed regulations under Code Section 401(a)(9) (by adopting IRS model amendments or otherwise) are eligible for the delayed effective date and transition rules without running afoul of the Code's anti-cutback rules. IRS has now confirmed that such plans are eligible for the relief described in Rev. Proc. 2003-10 and Notice 2003-2 and will not be treated as impermissibly cutting back benefits based on amendments that were already adopted.

EPCRS: GAC representatives also discussed the future of the Employee Plans Compliance Resolution System (EPCRS) with IRS. Revenue Procedure 2002-47 is currently being modified and is expected to be reissued soon. GAC discussed the possibility of modifying EPCRS to allow plan sponsors to make certain standardized corrections with only a notice type filing, possibly eliminating the more detailed submission and review requirements for VCS and other standardized corrections. IRS representatives indicated that abbreviated EPCRS filings would be considered and requested formal comments on this proposal. GAC's IRS subcommittee will be pursuing further discussions with IRS on this proposal.

GUST RAP: IRS representatives were asked whether further relief for sponsors who did not timely amend their plans for GUST is anticipated. IRS responded that relatively few plan sponsors took advantage of the relief provided under Rev. Proc. 2002-35 (IRS received only 300 applications) and that no further relief is anticipated. However, IRS representatives indicated that they are open to providing further relief if a significant number of sponsors have not timely amended and require relief.

Small Plan Operational Compliance: With regard to small plan operational compliance, IRS is currently working on a pilot program to contact small employers and request information concerning coverage, nondiscrimination testing, and other compliance information. IRS is also completing work on a comprehensive CD-ROM designed for 401(k) plan sponsors that will provide information and education about required testing and compliance for small employers.

412(i) Plans: There was also a discussion of certain aggressive plan designs currently being marketed as insured plans under Code Section 412(i). IRS representatives expressed concern about these aggressive plan designs and indicated that a notice may be issued and that they will be reviewing whether enforcement action is warranted.

Determination Letter Program: IRS representatives also outlined the current status of the determination letter program. IRS is receiving fewer determination letter applications than anticipated. As a result, they expect to complete the GUST determination letter review process within a few months after the September 30, 2003, deadline for submission of prototype

and volume submitter plans. IRS has assigned a substantial number of agents from the audit/examination division to review GUST determination letter applications. As the GUST review process is completed, a significant number of agents will go back to doing audits. IRS also continues to evaluate the future of the determination letter process and plans to issue an updated version of its white paper discussing alternatives for the determination letter program. IRS representatives noted that ASPA was the only organization to submit substantive comments on the initial white paper. ▲

James C. Paul, APM, Esq., is a shareholder of Chang Ruthenberg & Long PC, an employee benefits law firm. Jim's practice includes working with qualified retirement plans, nonqualified deferred compensation plans, welfare plans, stock based compensation plans, and all aspects of employee benefits law. His experience includes pension and welfare benefits litigation, fiduciary litigation, and representation of Taft-Hartley trust funds. Jim is the current chair of the ASPA IRS subcommittee and he frequently speaks and writes on employee benefits issues.

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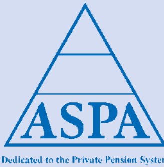

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For more information, call ASPA's Meetings Department at (703) 516-9300, e-mail us at **meetings @aspa.org**, or download a brochure from our Web site at http://www.aspa.org/conf/.

ASPA's Newly Restructured Education Program Debuts in 2004

by Michael L. Bain, MSPA

IN JANUARY 2003, AFTER TWO YEARS OF RESEARCH, ANALYSIS, AND PLANNING, THE ASPA BOARD OF DIRECTORS APPROVED THE E&E RESTRUCTURING PLAN. THIS ARTICLE WILL OUTLINE THE PROCESS AND DETAIL THE NEW REQUIREMENTS FOR DESIGNATIONS AND THE VARIOUS TRANSITION ISSUES THAT YOU MAY HAVE QUESTIONS ABOUT.

In January 2001, ASPA's Education and Examination (E&E) Committee General Chair, Gwen O'Connell, CPC, QPA, recommended that the Board of Directors change ASPA's education program. After further research by a task force established by the Board of Directors and the E&E Committee, a plan was developed to help pension professionals learn the complex and ever-changing myriad of rules, regulations, and legislation. The final plan reflects the many hours that ASPA's volunteers have spent to keep ASPA's programs second to none in our industry.

We feel that this newly restructured program will present material in smaller, easier to deal with pieces and in a more logical fashion. Result: The material will be easier to understand and digest. Further, we will still maintain the high educational standards for which ASPA is known.

The Changes

The major changes occurred in the QKA and QPA programs, particularly the **C-1** and **C-2(DC)** exams. The material for these two exams was combined, reorganized into a logical year-long course, and broken into three segments. The result is:

DC-1 (basic concepts),

DC-2 (compliance issues), and

DC-3 (advanced topics).

To allow a student to pass all three exams in a 12-month period, the testing windows will be opened three times a year.

In addition, the **PA-1** and **Daily Valuation** courses were redesigned into:

PA-1 (annual cycle),

PA-2 (event processing), and

PA-3 (daily valuation).

As a result of the restructuring, ASPA's Board of Directors, in accordance with ASPA's bylaws, established new designation criteria to earn the various ASPA designations with this new structure and established transition credits for those students who have begun, but not completed, the process.

The **Qualified 401(k) Administrator (QKA)** designation requires the successful passage of:

PA-1, **PA-2**, **PA-3**, **DC-1**, and **DC-2**.

The **Qualified Pension Administrator (QPA)** designation requires the successful passage of:

PA-1, **PA-2**, **PA-3**, **DC-1**, **DC-2**, **DC-3**, and **DB** (or QKA plus **DC-3** and **DB**)

The **Certified Pension Consultant (CPC)** designation requires the successful passage of:

PA-1, **PA-2**, **PA-3**, **DC-1**, **DC-2**, **DC-3**, **DB**, **C-3**, and **C-4** exams (or QPA and **C-3** and **C-4**)

Exam Transition Chart

Current Credit		Jan. 1, 2004 Credit
PA-1A	➠	PA-1
PA-1B	➠	PA-2
Daily Val	➠	PA-3
C-1	➠	DC-1
C-2(DC)	➠	DC-2
C-1 & C-2(DC)	➠	DC-1, DC-2, & DC-3
C-2(DB)	➠	DB
C-3	➠	C-3
C-4	➠	C-4

The new designation criteria will become effective on January 1, 2004.

So, what happens if you are part way through the exams?

The one key point to notice in the chart on page 28 is that if you have passed C-1 or C-2(DC), you will get credit for DC-1 or DC-2. However, if you have passed both exams, you will get credit for DC-1, DC-2 and DC-3. **Thus, if you have passed one, but not both exams, you get a one-time opportunity to pass the other exam this fall and get credit for two exams during the transition.**

This is a lot of information for one article and you and/or your employees may need some additional information. Later this year, ASPA will be notifying each candidate to explain their transition into the new program and which exams are needed to complete their designation. If you have questions, contact Jamie Pilot, ASPA's Director of Education Services, at (703) 516-9300 or **educaspa@aspa.org**, Emily Walker, Education Services Manager, or any member of ASPA's Membership Department.

* * * * *

Lest you think that the E&E Committee is not busy enough with all of the changes necessary to have new study guides and exams ready for 2004, here is an overview of some of the other E&E activities.

This spring, the C-3 essay exam was administered at Prometric, like our multiple choice exams. The candidates were able to use a keyboard and word processor rather than having to write his or her answers in longhand. E&E is also piloting an online grading program for the C-3 exams, which could reduce the time that it takes for a candidate to receive his or her grade by as many as two weeks. It is hoped that the C-4 exam will also be administered at Prometric this fall.

As you may remember, all grade reports and performance by chapter on the multiple choice exams are now delivered at the completion of the exam and given to the candidate prior to leaving the Prometric site. Also the PA series courses are offered online this year.

Look for online review sessions (Web courses) that will be tested this fall. A more complete implementation will occur next year along with the new education program.

It takes a lot of work and dedication to serve on ASPA's E&E Committee, but the results are improvements to ASPA's education program. My kudos to the committee and to the ASPA staff, who make ASPA's education program the best in the industry. If you are interested in serving with a dynamic group of volunteers who are committed to ASPA's education program, contact ASPA's Membership Department or fill out the Volunteer Application Form available on ASPA's Web site, www.aspa.org. ▲

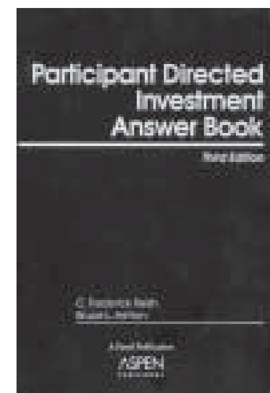
Michael L. Bain, MSPA, is president of CMC in Glendale, CA. Mike is General Chair of ASPA's Education and Examination Committee and a member of the Technology Committee. He is also a member of ASPA's Executive Committee and serves on the Board of Directors.

Do you have questions about...

➢ **401(k) Investments?**

➢ **Fiduciary Issues?**

Get the answers in the ***Participant Directed Investment Answer Book*** (third edition) by ASPA members **Fred Reish** and **Bruce Ashton** of Reish Luftman McDaniel & Reicher.



You'll find an in-depth look at issues unique to participant directed plans, including:

- **404(c) compliance**
- **401(k) fiduciary responsibility** for **plan sponsors**
- **Investment issues** arising out of **Enron** and other recent cases
- **Revenue sharing** and **fiduciary issues** for investment providers, brokers, TPAs and others

To purchase, go to our firm's web site at *www.reish.com* and click on the link under Spotlight or contact Aspen Publishers at (800) 638-8437.

Cultivating Pension Knowledge in The City of Brotherly Love

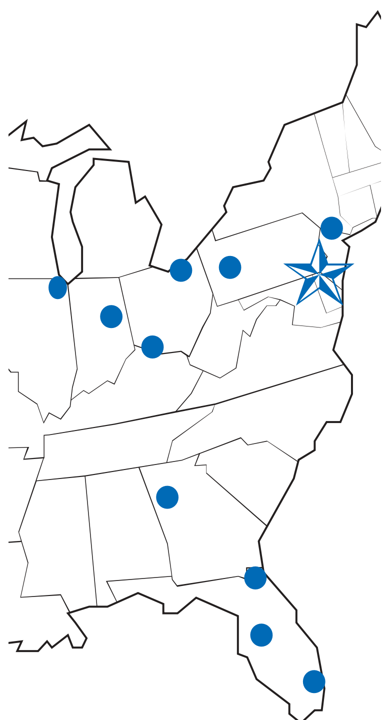
by David M. Burns, MSPA, CPC, QPA

SERVING THE METROPOLITAN PHILADELPHIA AREA, THE ASPA BENEFITS COUNCIL OF THE DELAWARE VALLEY (ABCDV) HAS PRODUCED A BUMPER CROP OF EDUCATIONAL OPPORTUNITIES FOR ITS MEMBERS DURING THE PAST 12 MONTHS.

In June of last year, we presented a program featuring a discussion of the DOL's Voluntary Fiduciary Correction Program and the IRS' Employee Plans Compliance Resolution System. The speakers were Mabel Capalongo, Regional Director of the PWBA in the Philadelphia area, and Carlton Watkins, Tax Law Specialist in the Employee Plans arm of the Tax Exempt and Government Entities Division of the IRS in Washington, DC.

After a summer hiatus, our program resumed in September with an interesting session addressing issues related to PEOs and the HR Outsourcing Industry. Featured speakers were: Steve Rosenthal, a business owner in the HR Outsourcing Industry, and John Bernard, Esq., a senior partner in the Philadelphia based law firm of Ballard Spahr Andrews & Ingersoll.

In October, renowned Philadelphia attorney Bob Bildersee delivered an entertaining and informative presentation entitled "Darling, You Didn't Even Notice," which featured an exploration of the numerous mandatory notices that must be given to participants, beneficiaries, and alternate payees. Attendees were given a sneak preview of some of the content of Bob's forthcoming book on this topic, including a terrific assortment of very useful sample notices.



November brought us a timely presentation covering "Things You Need to Do Before Year End" by Brian Dougherty, Esq., a Partner in the law firm of Morgan Lewis in Philadelphia.

Have you ever had fun learning about cash balance plans? Our members did just that in February when Philadelphia actuary and consultant Tom Finnegan, MSPA, CPC, QPA, addressed our group at a luncheon meeting. Tom took what could have been a very dry subject and brought it to life with a masterfully crafted combination of humor, practical examples, and detailed content covering both the basics and the current controversies surrounding cash balance plans.

ASPA's own Brian Graff, Esq., joined us in April and brought the membership up to date with the latest developments in Washington, including such topics as the newest legislative proposals from Congressmen Portman (R-2nd, OH) and Cardin (D-3rd, MD) and issues related to the Sarbanes-Oxley Blackout Notice requirements. As always, Brian's presentation was timely and very well received.

In May, the ABCDV teamed-up with ASPA and the IRS to co-sponsor the Mid-Atlantic Area Employee Benefits Conference in Philadelphia. This two-day conference brought top government speakers and pension professionals together for an outstanding learning opportunity covering a wide range of current regulatory, legislative, administrative, and actuarial topics.

Leveraging ASPA Webcasts

As an added benefit, the ABCDV periodically offers broadcasts of ASPA Webcasts to our members. The most recent offering was the IRS/ASPA Washington Update webcast presented in March. This program was offered in three locations throughout the area.

Promoting ASPA and Careers in Pensions

In April, Board Member and Immediate Past President Joe Leube, FSPA, CPC, attended the Temple University Fox School of Business and Management "Awards for Excellence Luncheon" and presented two $500 scholarships to deserving students pursuing a course of study in actuarial science. This year's scholarship recipients were: Sabrina Enam and Philip Stefano.

Our Local Benefit Council

One of the original local ASPA benefit councils, the ABCDV has been in existence since 1997. The success and longevity of our ABC is attributable to the untiring efforts of a small but dedicated group of local pension professionals who serve on the council's

ASPA Benefits Councils Calendar of Events

Date	Location	Event	Speakers
June 11	Western Pennsylvania	Compliance Issues	Bruce L. Ashton, APM
June 17	Atlanta	How to Fix a Broken Plan	John Hartness, Esq., Mary Lou Bailey-Funk, and Craig Pett
June 26	Cleveland	Successfully Negotiating with the IRS/DOL	TBA

board of directors. The current slate of officers and board members include:

- ***President:*** Jo Ann Massanova, CPC
- ***Immediate Past President:*** Joseph J. Leube, Jr., FSPA, CPC
- ***Vice President:*** John Van Buren, MSPA
- ***Treasurer:*** R. Dennis Vogt
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- ***Public Relations Chair:*** Mary T. Bruce
- ***Accreditation Chair:*** Sandra J. Uzdavinis
- ***ASPA Liaison:*** Stephen H. Rosen, MSPA, CPC
- ***Membership Chair:*** W. Michael Gradisek ▲

David M. Burns, MSPA, CPC, QPA, MAAA, is an enrolled actuary and senior consultant at The Vanguard Group in Valley Forge, PA. Dave has over 27 years of experience in the design and administration of qualified plans and currently serves as a board member and secretary of the ABCDV.

You only need **ONE** pension resource...

The 2003 Edition of

The ERISA Outline Book

The 2003 edition of *The ERISA Outline Book*, authored by ASPA member Sal L. Tripodi, APM—a MUST for pension professionals—is now available for purchase only through ASPA. All four volumes are also available on a searchable CD-ROM.

The ERISA Outline Book is one of the most widely used reference books in the pension field and consistently receives excellent reviews.

The newest version includes:

- Updates and information about deadlines for GUST and EGTRRA
- Amended participant loan regulations
- Final minimum distribution regulations, blackout notice regulations
- Expanded information on 403(b) plans, 457 plans, and IRAs

Also new for 2003—The ERISA Outline Book C-1 Student Edition

The C-1 Student Edition provides the information from *The ERISA Outline Book* that C-1 examination candidates need to prepare for the exam.

To purchase the 2003 edition of *The ERISA Outline Book* or the C-1 Student Edition, download an order form on ASPA's Web site at http://www.aspa.org/edu or contact ASPA's Education department at (703) 516-9300 or **educaspa@aspa.org**.

"If there is one book all pension professionals must have in their libraries, it is The ERISA Outline Book. *This high quality reference book has enhanced the education of retirement plan professionals around the country."*

—Michael L. Bain, MSPA, General Chair, ASPA Education and Examination Committee

Continuing Education Program Update

by Cynthia A. Groszkiewicz, MSPA, QPA

ASPA'S CURRENT CONTINUING EDUCATION (CE) PROGRAM CYCLE BEGAN ON JANUARY 1, 2003, AND CONTINUES THROUGH DECEMBER 31, 2004. ASPA HAS A MANDATORY PROGRAM OF CONTINUING EDUCATION THAT PERTAINS TO ALL MEMBERS HOLDING ASPA DESIGNATIONS, INCLUDING FSPA, MSPA, CPC, QPA, QKA, AND APM. IN ORDER TO KEEP YOUR ASPA DESIGNATION, YOU MUST EARN 40 CE CREDITS DURING THIS TWO-YEAR CYCLE (AND IN EVERY FUTURE TWO-YEAR CYCLE). FOR NEWLY DESIGNATED MEMBERS AND THOSE REINSTATING A DESIGNATION, THE NUMBER OF CE CREDITS REQUIRED IS PRO-RATED BASED ON THE DATE OF ADMITTANCE OR REINSTATEMENT WITHIN THE TWO-YEAR CE CYCLE.

If a designated member fails to comply with the continuing education requirements, his or her designation will be suspended. Members may reinstate the suspended designation by earning 40 CE credits and paying a $50.00 reinstatement fee.

New This Cycle

Beginning with the 2003–2004 CE cycle, ASPA exams, including those taken to earn the first designation, may be claimed for credits in the two-year CE cycle in which the grade is issued. Also new this cycle, the number of credits earned for *The ASPA Journal* quizzes has been increased. Beginning with the January–February 2003 issue of *The ASPA Journal*, passed quizzes earn two credits each (one credit is offered for each passed 2002 quiz). *The ASPA Journal* also occasionally offers "Bonus CE" articles, as in the January-February 2003 Nondiscrimination Testing article. In addition, five new 2002 ASPA Summer Conference CE quizzes have been added to the ASPA CE program, with more to come, providing as many as 1.5 credits each.

How to Earn Credit

The ASPA Continuing Education Committee continues to develop a diverse and comprehensive

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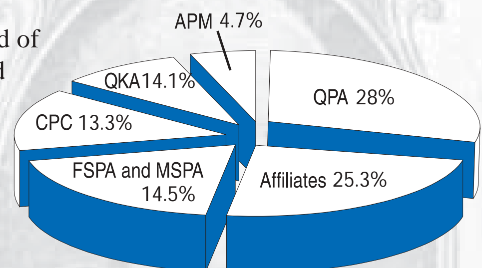
The ASPA Journal, published bi-monthly, reaches beyond ASPA's membership to many government (IRS, DOL, Treasury) employees, investment advisors, and retirement plan professionals.

The ASPA Journal is mailed to all ASPA members and distributed at industry-wide conferences and regional meetings of the ASPA Benefits Councils (ABCs).

ASPA's membership, more than 4,800 strong, is comprised of actuaries, retirement plan professionals who have earned ASPA's credentials, associated professional members such as attorneys, CPAs, CLUs, ChFCs, and affiliate members. The chart represents ASPA's membership composition.



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continuing education program to address the needs of our members. Did you know that a total of 51 ASPA CE credits can be earned annually without even leaving your desk? They include:

	Credits
The ASPA Journal Quizzes 6 at 2 credits each	12
Conference Quizzes 10 at 1.5 credits each	15
Webcasts (live/recorded) 12 at 2 credits each	24
	51

Other methods of obtaining CE through ASPA-sponsored programs include:

1. Annual, Summer, and Business Leadership Conferences (20 credits each), five IRS co-sponsored programs, and the 401(k) Sales Summit (15 credits)
2. ASPA-sponsored exams
3. Other educational programs: Weekend Courses and local ASPA Benefits Council meetings

For a full explanation of the CE requirements and other opportunities for CE, check the ASPA Web site at http://www.aspa.org/faq/conted.htm or contact the ASPA office at (703) 516-9300. ▲

Cynthia A. Groszkiewicz , MSPA, QPA, is the director of Employee Benefits with Greenberg Traurig, LLP, Atlanta, GA. Cynthia has over 30 years of experience in the benefit plan administration, consulting, plan design, and IRS and DOL audit representation. She is also an Associate of the Society of Actuaries, a Member of the American Academy of Actuaries, and an actuary enrolled by the Joint Board. She currently serves on the ASPA Board of Directors, is a former Editor-in-Chief for The Pension Actuary, *and was the founder of the ASPA Benefits Council of Atlanta. Cynthia has developed customized software for plan actuarial valuations, contribution allocations, discrimination testing, cross-testing, super-integrated and age-weighted profit sharing plans, target benefit pension plans, and testing under Code Sections 401(a)(4), 410(b) and 401(a)(26). Cynthia is a frequent speaker on benefit issues, including the Enrolled Actuaries Meeting and The Georgia Medical Office Management.*

Welcome New Members

Welcome and congratulations to ASPA's new members and recent designees.

MSPA

Donald M. Absey

CPC

Dennis P. Miceli
Trent E. Newcomb
Rodney W. Stortenbecker
Jonathan P. Yahn

QPA

Philip W. Cannato Jr.
Rita D. Carlton
William J. Hein
Teresa J. Leonard
Robert T. Loveless
Dennis P. Miceli
Kristin A. Todd
Karen A. Wilt
Mark A. Zajicek

QKA

Carla M. Bailey
Thomas R. Benoit
Dion J. Brockway
Philip W. Cannato Jr.
Ryan J. Christensen
Maryann T. Coudriet
Deborah J. Feeley
Brenda Grazetti
William J. Hein
Todd A. Henry
Mandy E. Hunter
Leslie A. Julianel
Marjorie A. Laughmiller
Mary Kay McBride
Maureen T. McGowan
Veronica B. Medlin
Amy J. Morris
Julie E. O'Brien
Lanny T. Olson
Marie Shebuski
Kristin A. Todd
Lora D. Trent
Rebecca D. Witherow

APM

Edgardo Barreto
Craig C. Dewey
M. Riggs Goodman
Thomas F. Kerney III
Thomas C. Pritchett
Akihiro Yabe

Affiliate

Michael Steven Blake
Barbara L. Bradley
Kathy L. Casavant
Christopher T. Casey
Walter C. Cotumaccio
Chad M. Devinney
Lawrence M. Doody
Marjorie Ewing
Leisa M. Filiatrault
Nancy A. Flachsbart
Kimberly A. Flemm
Marcy Goyette
Robert A. Johnston
Kendall Kay
Tiffany King
John D. Linabury
Monica A. Martinez
Karin S. Merrell
Susan B. Neethling
Terry A. O'Prey
Donald E. Park
Cornelius P. Pigott
Patsy Z. Randall
Erik A. Read
Donald Salama
Tammy Shinohara
Ronald J. Thurber

FUN-da-MENTALs

The Voice of Innocence

Child: Mommy, why does Daddy always have work to do when he gets home?

Mother: Because Daddy doesn't have time to get all of his work done during the day at the office.

Child: Maybe they should put him in a slower group.

SIDE FUN

"Now that we've agreed on the loopholes, what should the tax laws be?"

The Alphabet Song (revised?)

ABC-DB-DC
IRS-401K-G!
QDRO-PBGC
VCR-5500EZ
Now I've said my
ABC's.
Mommy, aren't you
proud of me?

CAUTION!

If you've heard this version of the ABC's sung by one of your children, you probably ARE bringing too much work home!

WORD SCRAMBLE

Unscramble these four puzzles—one letter to each space—to reveal four pension-related words. Answers will be posted on ASPA's Web site at https://router.aspa.org. Once you have logged in, place your cursor over the Membership tab in the navigation dropdown menu. Move to Membership Benefits, then click on *The ASPA Journal*. The answers are located near the bottom of the page.

ICE HOC	○ ○ ○ ○ ○ _
LEND BUD	○ ○ ○ _ _ _ _
SET TAUT	○ ○ ○ ○ ○ _ _
ROOT IN A CROP	○ _ ○ ○ ○ _ _ ○ ○ _ ○

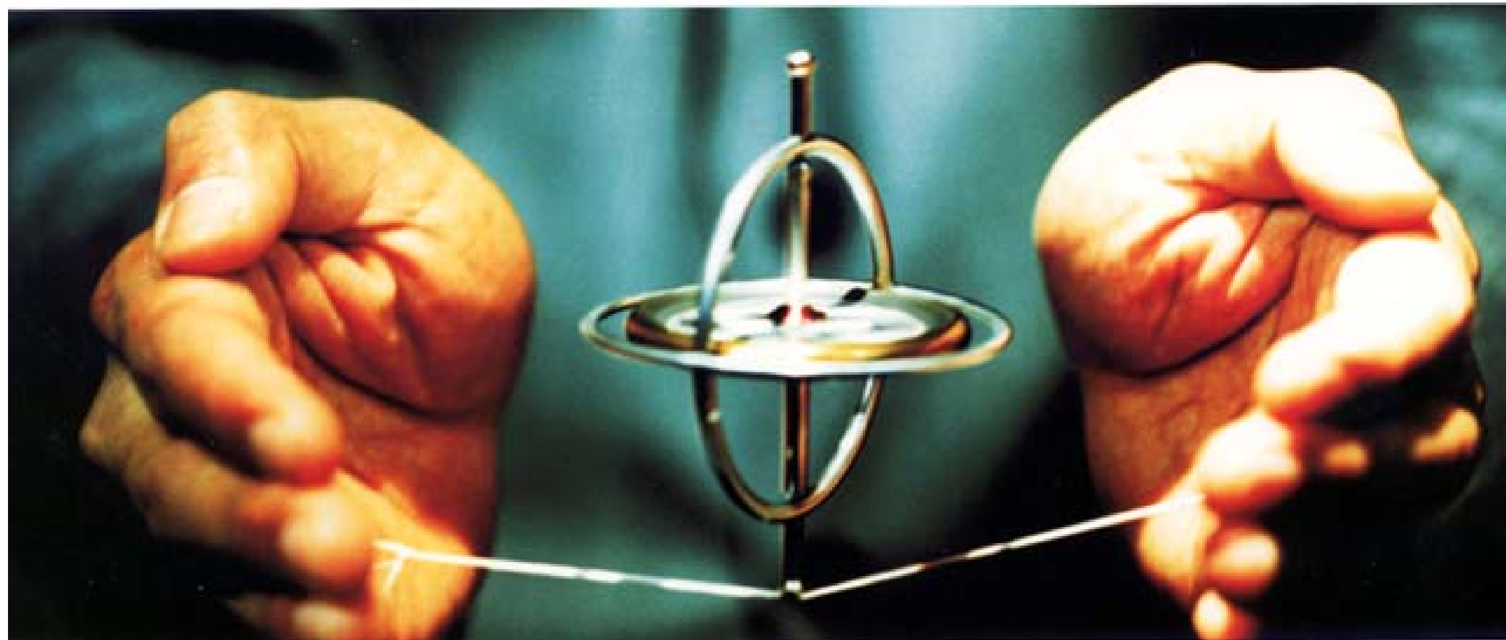
BONUS: Arrange the circled letters to form the Mystery Answer as suggested by the cartoon.

Mystery Answer:

His "○○○○○ - ○○" ○○○○○○○○○○○○○.

What helped IRA win the race after he crossed over the hill?

Balancing a portfolio doesn't have to be complicated.



You just have to know where to turn – Victory Fund for Income.

Finding stability for clients in a volatile market is simply a matter of balance. The Victory Fund for Income is a fixed income fund that invests exclusively in Ginnie Maes, U.S. Treasuries, and short-term investments backed by the full faith of the U.S. government.* And it's actively managed for prepayment risk and stable returns. Build stronger portfolios for your clients through a better balancing act – choose the Victory Fund for Income.

Victory Funds

Victory Funds are available through numerous retail and retirement plan platforms. For additional information, please call the Victory Financial Professional Line at 1-800-423-0898.

Past performance is no guarantee of future results. *U.S. government guarantees apply only to the underlying securities of the Fund's portfolio and not the Fund's shares. Investment policies are subject to change. Fund for Income provides balance as the fixed-income component of a diversified portfolio. Distributor: BISYS Fund Services. Victory Capital Management Inc., a member of the Key financial network, is the investment advisor to the Victory Funds and receives a fee from the funds for its services. For more complete information on the Victory Funds including fees, expenses, and risks, view our prospectus and most current performance information at Victoryfunds.com or call 1-800-539-FUND. **Read carefully before investing or sending money.**

• NOT FDIC INSURED • NO BANK GUARANTEE • INVESTMENTS MAY LOSE VALUE

Education

September 30
Early Registration Deadline for Fall Examinations

October 31
Final Registration Deadline for Fall Examinations

November 1–December 15
C-1, C-2(DB), and C-2(DC) Fall Examination Window

Conferences

July 27–30
Summer Conference
Irvine, CA

Sep 11–12
Mountain States Benefits Conference
Denver, CO

A Conference Designed for

YOU & with YOU,

the Benefits Professional,

in Mind!

Register by August 15, 2003 and Take Advantage of Reduced Registration Fees!

Some of the Topics

- The Service Provider -vs- The Plan Sponsor: Who Does What? And Why?
- A Practical Approach to Plan Issues in Mergers and Acquisitions
- Voluntary Compliance Update
- DB Plans for Dummies
- Fiduciary Compliance Audits and Reviews
- 403(b)/457 Plan Update
- HIPAA Security Regulations

2003 Mountain States Benefits Conference

Denver, Colorado

September 11–12, 2003

For more information visit ASPA's Web site at www.aspa.org.

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Calendar of Events

2003		ASPA CE Credit
Jun 12	Northeast Key Conference Boston, MA	8
Jun 13	Northeast Key Conference White Plains, NY	8
Jul 22	Grades for spring 2003 examinations released	
Jul 27–30	Summer Conference Irvine, CA	20
Sep 11–12	Mountain States Benefits Conference Denver, CO	16
Sep 12–15	EA-2(A) Exam Weekend Courses Washington, DC	
Sep 19–22	EA-2(A) Exam Weekend Courses Chicago, IL	
Sep 20–23	Business Leadership Conference Uncasville, CT	20
Sep 30	Early Registration Deadline for Fall Examinations	
Oct 1–4	EA-2(A) Exam Weekend Courses Los Angeles, CA	
Oct 26–29	Annual Conference Washington, DC	20
Oct 31	Final Registration Deadline for Fall Examinations	
Nov 1	Registration Deadline for Fall Weekend Courses	
Nov 1–Dec 15	C-1, C-2(DB), and C-2(DC) Fall Examination Window	

Did You Know?

While many associations are struggling to maintain membership numbers, ASPA's membership steadily increases each year. Our membership currently stands at 5,100 and has increased by an average of 7%-8% each year for the past five years.

In addition to the membership growth, ASPA has an excellent retention rate that is almost unheard of among professional associations. For the past five years, a total of 92%-95% of members have chosen to renew their membership. If you calculate only the designated members and exclude affiliate members, the retention rate is even greater at 96%-97% each year.

We wish to thank all of our members for our continued growth and hope that 2003 proves to be another successful year!