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Megacompany Employee Churn Meets 401(k) Vesting Schedules: A Sabotage on Workers' Retirement Wealth

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Retirement wealth inequality and retirement security are issues that the United States has been grappling with for years. Low-paid and minority workers are most likely to be unable to accumulate retirement savings over time. This Article spotlights Amazon, one of America's largest employers and one that has very high employee turnover. To be vested in Amazon's 401(k) matching contributions, an employee must be there for three years—a requirement that is not being met given the much quicker turnover in their low-paid, predominantly minority warehouse workforce.

Until now, there has not been discussion about the grossly unfair result of mixing high employee turnover and 401(k) plan vesting schedules. This Article shows that sizeable high-turnover companies are utilizing legal 401(k) plan

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vesting schedules to their own benefit with the effect of worsening retirement wealth inequality.

This Article argues two steps are necessary solutions to address this problem. The first argument aligns with President Biden's order to governmental agencies to step up their data collection to quantify the inequities in the legal system. We need to collect more specific data on gender, race, and pay of those who terminate prior to vesting. This will allow us to assess the impact of vesting schedules on retirement plan inequality.

The Article then argues that megacompanies should be foreclosed from using vesting schedules in their retirement plans. They simply employ too many people, and many are in high-turnover businesses. It is against public and retirement security policy to allow high-turnover megacompanies to shortchange employees and take advantage of vesting schedule use in their 401(k) plans particularly when the goal of using vesting schedules—to retain employees—is not being met.

Something needs to be done to address the direct tension in retirement plan policy when employers that know they have high turnover use a vesting schedule. The Article sets forth various tests as alternatives to immediate vesting. Each method has the potential to incentivize companies to reduce churn. If a company does not want to be subject to a new test, then it could simply amend its plan to immediately vest everyone.

I. INTRODUCTION

In 2021, the New York Times reported that Amazon engages in deliberate employee churn.[1] Jeff Bezos, founder and former CEO of Amazon, Incorporated, believed that having a workforce that was over three years old would be a "march to mediocrity."[2] Amazon policies doubled down on this belief by ceasing guaranteed wage raises after three years, thereby incentivizing low-paid employees to leave prior to that time.[3] The New York Times further reported harsh working conditions for hourly workers.[4] Through anxiety-inducing measures such as unreasonable "time off task"

1. Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html?campaign_id=9&emc=edit_nn_20210615&instance_id=33021&nl=the-mor%E2%80%A6 [https://perma.cc/2D7C-7M2C] [hereinafter Kantor et al., *The Amazon That Customers Don't See*].

2. *Id.*

3. Amazon also offered other incentives to promote departure, such as severance bonuses. *Id.* (describing how Amazon "intentionally limit[s] upward mobility for hourly workers") Workers became too scared to go to the restroom and were using bins and bottles in the warehouse to relieve themselves. *Id.*; *see also* Letter from Sens. Marco Rubio & Sherrod Brown to Martin Walsh, Sec'y, U.S. Dep't. of Lab. of U.S. Department of Labor (Dec. 20, 2021), https://www.rubio.senate.gov/public/_cache/files/bee553dc-18bc-4fca-b1e4-63435e7a5591/E3B940055ED54043E17BA7A6E088B1FC.12.20.21-letter-to-secretary-walsh-requesting-investigation-into-amazon-labor-practices.pdf [https://perma.cc/GGD3-63ZM] (urging investigation into Amazon's labor practices); Jodi Kantor, Karen Weise & Grace Ashford, *Inside Amazon's Worst Human Resources Problem*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/10/24/technology/amazon-employee-leave-errors.html [https://perma.cc/5PQB-49NE] [hereinafter Kantor et al., *Inside Amazon*].

4. Kantor et al., *The Amazon That Customers Don't See*, *supra* note 1.

policies, Amazon made working conditions intolerable for low-paid, hourly, predominantly minority workers.[5] People either quit, were fired for missing quotas, or were fired accidentally by Amazon's Human Relations Artificial Intelligence program.[6] This Article explains how such turnover negatively affects workers' retirement benefit accumulation and exacerbates retirement wealth security.

Numerous employers—Amazon included—offer their employees the ability to participate in a 401(k) plan to which employers contribute through matching or other types of contributions. When employees contribute money from their paycheck (salary deferrals), the contributions are nonforfeitable. However, whether employer contributions are nonforfeitable depends on the employer's plan and whether it employs a vesting schedule. Forty-eight percent of 401(k) plans offer immediate vesting for matching contributions.[7] What this means is that most plans require that employees stay for certain periods of time before vesting in their employer contributions. For example, high-turnover megacompanies like Amazon require that their employees complete three years of service before any vesting in employer contributions occurs.[8] Therefore, the mass of people who work for these companies for less than three years of service walk away with no employer contributions in their 401(k) plan accounts.

It is important to consider the impact of combining turnover and vesting schedules on retirement security and retirement wealth inequality. In plans with vesting schedules, employees do not receive the contributions that the company made on their behalf if they terminate employment prior to vesting. This leaves them in a precarious position when it comes to their

5. *Id.*; Letter from Sens. Rubio and Brown, *supra* note 3; Avi Asher-Schapiro, *As California sizzles, Amazon drivers feel the heat over metrics*, THOMPSON REUTERS (Sept. 12, 2022), https://news.trust.org/item/20220913144832-m6s29/ [https://perma.cc/TF2J-RG7Z].

6. Kantor et al., *The Amazon That Customers Don't See*, *supra* note 1; Kantor et. al, *Inside Amazon*, *supra* note 3.

7. *How America Saves 2022*, VANGUARD 15, https://institutional.vanguard.com/content/dam/inst/vanguard-has/insights-pdfs/22_TL_HAS_FullReport_2022.pdf [https://perma.cc/T2FT-3AEX]. Many high-turnover companies are represented in this 48% figure, including Walmart. *Id.*

8. 26 U.S.C. § 411(a)(2)(B)(ii). A year of service is usually identified as 1,000 hours of service in a 12-month period. *See* Amazon.com Servs., Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 6, 2022); The Home Depot, Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 19, 2022).

retirement.[9] These individuals have less money in their retirement accounts to invest, which directly impacts their ability to accumulate retirement wealth. Since many of the people who are churning in businesses like Amazon and Home Depot are lower-paid, marginalized workers, the use of vesting schedules in tandem with this churning exacerbates retirement wealth inequality. Employees who work in Amazon's warehouses are disproportionately minorities, and they are also the ones likely leaving before they are vested in their employer contributions.[10] In 2021, the demographics of Amazon warehouse workers—who Amazon calls "field and customer support"—were 32.9% Black, 27.2% Latinx, 26.7% White, 3% Multiracial, and 1.7% Native American. From its policies, Amazon appears to be deliberately trying to induce these employees to quit before completing three years of service. Individuals who do terminate employment before their third year of service will not vest in their Amazon contributions, given Amazon's 401(k) plan's three-year cliff vesting schedule.

When companies *know* they have high turnover, or deliberately cause this turnover as part of their internal policies, and use a vesting schedule, they flout our retirement system. They double-dip and use any amounts forfeited by those plan participants to reduce their compensation costs. Additionally, they misrepresent employee benefits when they lure people to work for them with "401(k) benefits," all the while knowing that it is highly unlikely the person will make it three years to receive those benefits.

Part II starts with retirement plan background and proceeds with a brief history of vesting schedules and the policy behind their use. It then provides

9. The current retirement system is failing too many people. Critical tax policy and employee benefits scholars have exposed a plethora of faults in the retirement system, proving disproportionate impacts across income levels, race, and gender. Recently, scholars have testified before Congress to raise awareness and to propose solutions. The inequities exacerbated by the 401(k) plan vesting rules have been addressed less often in these conversations and, to my knowledge, no one has observed the issue this Article covers—mixing these vesting schedules with high turnover. *See, e.g.*, Nari Rhee, Dir., Ret. Sec. Program, Ctr. for Lab. Rsch. and Educ., Univ. of Cal. at Berkeley, Statement Before the ERISA Advisory Council Working Group on "Gaps in Retirement Savings Based on Race, Ethnicity and Gender" (June 24, 2021); Dorothy A. Brown, Asa Griggs Professor of L., Emory Univ., Statement Before the U.S. Senate Committee on Finance (Apr. 20, 2021).

10. *See* Amazon Staff, *Our Workforce Data*, AMAZON.COM, https://www.aboutamazon.com/news/workplace/our-workforce-data [https://perma.cc/N5M2-7QFP].

an explanation of 401(k) plan vesting mechanics, including how companies use money forfeited by those who leave with unvested balances to reduce their own expenses. This Part includes employers' rationales for using vesting schedules in their plans. Part III then pulls together research disclosing which schedules large companies are using. This Part continues with a discussion on high employee turnover, Amazon's employee churn policies, and the effect of churn on retirement savings.

Part IV describes two major causes of retirement wealth inequality—generational wealth inequality and financial illiteracy. It then discusses vesting's role in exacerbating the retirement wealth gap and directly contributing to retirement wealth inequality. Part of this section puts the spotlight directly on Amazon and the deleterious effects of its employee churn, which works in tandem with the use of an all-or-nothing vesting schedule. It also considers whether these policies violate the Employee Retirement Security Act (ERISA) Section 510 or Internal Revenue Code (IRC) Section 411(d)(1).

In Part V, this Article argues two main steps to solve the misalignment between high turnover and vesting schedules. The first argument aligns with President Biden's order to governmental agencies to step up their data collection to determine inequities in the legal system. We need to collect more specific data on the gender, race, and pay of those who terminate prior to vesting. With data collection focused on demographic and pay data for those who terminate employment prior to being fully vested, we can assess the high-turnover vesting schedule impact on minorities, women, and lower-income workers. The Article provides a glimpse into the harms that marginalized groups who work in high-turnover businesses experience because of vesting schedules.

This Article ultimately argues that we should change the law to prohibit the use of vesting schedules by megacompanies and other high-turnover businesses. There are two ways in which we can accomplish this. First, by providing employees vested benefits from the time they begin to participate in the 401(k) plan, we can help reduce retirement wealth inequality and increase retirement security. As an alternative to immediate vesting, we can implement a rule that directly hits known and/or deliberate high-turnover megacompanies. One method would be to consider the number, rather than percentage, of employees in a workforce when determining whether a partial plan termination has occurred. Another method would be to mimic existing anti-discrimination testing, but in a manner that focuses on forfeitures of lower-paid workers. These approaches would reduce employee churn, incentivizing companies to do better for their employees, and, if the company does not want to be subject to such testing, it could simply amend its plan to provide immediate vesting.

II. Vesting and Forfeitures

A. Background

Representative Ullman from the Committee on Ways and Means submitted a report on Private Pension Tax Reform on February 5, 1974, recommending that the House of Representatives pass HR 12481—a bill to amend the Internal Revenue Code of 1954 to provide pension reform. In this report, the Committee outlined the importance of retirement plan/pension reform:

> One of the most important matters of public policy facing the nation today is *how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire*. This legislation is concerned with *improving the fairness and effectiveness of qualified retirement plans* in their vital role of providing retirement income. In broad outline, the objective is to increase the number of individuals participating in employer-financed plans; to make sure to the greatest extent possible that, those who do participate in such plans *actually receive benefits* and *do not lose their benefits as a result of unduly restrictive forfeiture provisions* or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations; and *to make the tax laws relating to qualified retirement plans fairer by providing greater equality of treatment under such plans for the different taxpayer groups concerned*.[11]

The emphasized language above provides several key goals of employer-sponsored qualified retirement plans and vesting. While this statement did not formally set "national retirement policy," and was seemingly specific to that legislation, it gives us a framework to work within and can serve as a reference policy now.[12] Concern over preferential tax treatment for qualified plans and ensuring equality of treatment for different taxpayer groups, here low-paid workers—including people of color—is still a current concern. As such, we can consider the above policies through a current lens.

11. H.R. Rep. No. 93-779, at 8 (1974) (emphasis added); *see generally* James A. Wooten, The Employee Retirement Income Security Act of 1974: A Political History 233–40 (2003) for a discussion of H.R. 12481.

12. Phyllis C. Borzi, *A National Retirement Income Policy: Problems and Policy Options*, 19 U. Mich. J.L. Reform 5, 9-11 (1985).

Retirement wealth accumulation is still an issue today. Are the laws surrounding qualified plans doing all they can to assure that individuals who have spent their careers in useful and socially-productive work will have adequate incomes to meet their needs when they retire? Have we done all we can to improve the fairness and effectiveness of qualified retirement plans? Are our current tax laws relating to qualified retirement plans fairer by providing greater equality of treatment under such plans for the different taxpayer groups concerned?

A focus on retirement security must consider the benefits that come from the plans, and whether they exist for low- and moderate-income workers, including minorities, who consistently have lower retirement savings.[13]

> A public subsidy to employer-provided pension plans [in the form of tax privileges] can be defended only if such plans contribute substantially and fairly to the wage replacement goal of public retirement security policy. This means that such plans must assist significantly in maintaining preretirement lifestyles of low- and moderate-income workers even if they also sustain postretirement lifestyle maintenance for high-income retirees.[14]

And when it comes to inequality, "the ownership of financial assets, much like the ownership of wealth broadly, is highly concentrated among Americans of high net worth. This stark inequality in the ownership of financial assets undermines the premise of a retirement system built around the individual ownership of financial assets in defined contribution (DC) accounts."[15]

Retirement wealth inequality is a serious issue in the United States, as there is a "massive retirement savings gap by race and ethnicity, so that households of color often have less wealth than White households."[16] A

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13. *See* Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 PENN. L. REV. 852, 881-83 (1987).

14. *Id.*

15. TYLER BOND, NATIONAL INSTITUTE ON RETIREMENT SECURITY, STARK INEQUALITY: FINANCIAL ASSET INEQUALITY UNDERMINES RETIREMENT SECURITY 1 (Aug. 2021).

16. Dania V. Francis & Christian E. Weller, *Race, Ethnicity, and Retirement Security in the United States*, *in* OXFORD RSCH. ENCYCLOPEDIA ECON. & FIN. (J. Hamilton ed., 2021) 1 ("In 2016 Black households had a median retirement savings account balance of $23,000, compared to $67,000 for White households."); ELLEN E. SCHULTZ, RETIREMENT HEIST 207 (2012) (stating that "401(k)s have been a boon

2019 report by the Federal Reserve showed that the median balances of household retirement accounts were $80,000 for white households, $35,000 for Black (non-Hispanic) households, and $31,000 for Hispanic households.[17] This disparity has consistently haunted our retirement system.[18] A lack of intergenerational wealth, plan access,[19] plan

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primarily for high-income employees, who can afford to save . . . "); Daniel I. Halperin & Alicia H. Munnell, *Ensuring Retirement Income for All Workers*, in THE EVOLVING PENSION SYSTEM: TRENDS, EFFECTS, AND PROPOSALS FOR REFORM 155 (William Gale, John B. Shoven & Mark J. Warshawsky eds., 2000).

17. BD. OF GOVERNORS OF THE FED. RESERVE SYS., SURVEY OF CONSUMER FINANCES (SCF), 1989-2019, (Nov. 4, 2021), https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Retirement_Accounts;demographic:racecl4;population:all;units:median [https://perma.cc/8ETR-PBMK].

18. A review of the Survey of Consumer Finances data shows that white households have always had larger median retirement accounts than households of other races have. *Id.*

19. Because employers are not required to offer retirement plans, some individuals lack access to plans. Academics note that disparate access to, and participation in, retirement plans are factors exacerbating disparities in wealth by race and ethnicity. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RESERVE, https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/XBM8-F6WD] ("In all age groups, Black and Hispanic families are far less likely to have [IRAs or defined contribution] retirement accounts. For example, among middle-aged families—who have the highest rates of account ownership—65 percent of White families have at least one retirement account, compared to 44 percent of Black families, and just 28 percent of Hispanic families."); Catherine Harvey, *Access to Workplace Retirement Plans by Race and Ethnicity*, AARP PUB. POL'Y INST. (Apr. 27, 2016), https://www.aarp.org/content/dam/aarp/ppi/2017-01/Retirement%20Access%20Race%20Ethnicity.pdf [https://perma.cc/RP38-BPS9] ; *see also* Chris Farrell, *The Touch Retirement Challenges of Rural Americans*, FORBES (Mar. 13, 2020), https://www.forbes.com/sites/nextavenue/2020/03/13/retirement-challenges-of-rural-americans/?sh=3a770cc13262 [https://perma.cc/C6XH-FCHP] ("Farmers are often asset rich, but they don't have much income, especially in recent years with farm income on the decline. And since farmers are often self-employed, with an average of four employees, it often isn't economic for them to offer a 401(k)."); John Sabelhaus, *The Current State of U.S. Workplace Retirement Plan Coverage* 25 (Wharton Pension Rsch. Council, Working Paper No. 726, 2022) (concluding that 63.6%

participation, lower risk tolerance, and financial illiteracy have contributed to this disparity. While there has been progress, changing vesting rules would provide more momentum toward this progress. Low-paid workers are disproportionately Black and Hispanic, as is Amazon's warehouse workforce. Combined use of a vesting schedule with high turnover or "employee churn" negatively impacts groups with the lowest retirement savings, thereby contravening the goals of retirement policy. Additionally, while low-paid and minority workers have accumulated less wealth, due in part to their relative inactivity in the stock market, Black people do "cite workplace retirement plans as their reason for starting to invest."[20] The more money workers have in their retirement plans, the more they can invest. Vesting plays a pivotal role in accumulating wealth because the money is not theirs until it vests.

To analyze whether current vesting and forfeiture provisions further the above stated goals to increase retirement wealth accumulation for all, some background will prove helpful.

In the employer-sponsored retirement plan schema, there are two main types of plans: defined benefit and defined contribution.[21] Defined benefit plans provide for a set amount of retirement benefits when employees

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of Hispanics, 53.2% of Blacks, 45.2% of Asians, and 41.6% of Whites are not covered by a pension or 401(k)-style plan in the United States, and finding that there are substantial gaps in access to 401(k) plans because of differences in employer size, earnings, and education); Nari Rhee, Dir., Ret. Sec. Program, Ctr. for Lab. Rsch. and Educ., Univ. of Cal. at Berkeley, Statement Before the ERISA Advisory Council Working Group on "Gaps in Retirement Savings Based on Race, Ethnicity and Gender" 2 (June 24, 2021) ("[T]he employer-sponsored retirement system leaves out many groups of workers, in a manner that disproportionately impacts women and people of color, particularly Blacks and Latinos. The resulting gaps in coverage interact with labor market segmentation and broader social and economic inequalities—for instance in employment opportunity, generational wealth, and responsibility for care work—to produce marked inequalities in retirement assets by race, gender, and income.").

20. Philip C. Aka & Chidera Oku, *Black Retirement Security in the Era of Defined Contribution Plans: Why African Americans Need to Invest more in Stocks to Generate the Savings they Need for a Comfortable Retirement*, 14 RUTGERS J.L. & PUB. POL'Y 169, 193 (2017).

21. WILLIAM A. BIRDTHISTLE, EMPIRE OF THE FUND—THE WAY WE SAVE NOW 9 (2016) (stating that both types of plans share the "overarching goal . . . that the corpus of contributions, augmented with decades of investment returns, will eventually amount to a valuable nest egg that can support the employee when [they are] no longer actively employed and earning").

retire, and do not rely upon a plan's investment experience.[22] The employer contributes what is necessary to the plan in order to fulfill the set amount.[23] Defined contribution plans, also known as "individual account plans," however, commonly allow for both employer and employee contributions.[24] Instead of a set amount at retirement, an employee will ultimately receive the amount in their account, which likely increases over time through investing the aforementioned contributions.[25] Not knowing how much to withdraw and when puts the recipient in a precarious position. "Withdraw too much, and the fund will be exhausted before death; withdraw too little and he or she may be depriving himself or herself of enough income to maintain a comfortable lifestyle."[26]

The most familiar private-employer defined contribution plan is the 401(k) plan.[27] It is so named because it was created by section 401(k) of the

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22. *See* 26 U.S.C. § 414(j); 29 U.S.C.§ 1002(35); *see also* Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 610 (2000).

23. Employee contributions are also permitted in defined benefit plans. This is an elementary description of defined benefit plans, but it serves the purpose of comparison here.

24. 29 U.S.C. § 414(u)(6).

25. *See* DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 276 (2004) (noting that, in defined-contribution plans, "[i]f the employee is an investment whiz or just plain lucky, she will end up with a lot of money . . . [b]ut if the money is invested too conservatively or too aggressively, or if the worker is not free to change investments when the market shifts, then there may not be enough money to finance a retirement, forcing her to keep working lest her money runs out before life does"); *see also* 29 U.S.C. § 1002(34) (defining the term "individual account plan" or "defined contribution plan" as a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account").

26. David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1119 (2008).

27. While there are other forms of retirement plans, such as IRA-based Simplified Employee Pension Plans (SEP) and Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) plans, and Safe Harbor 401(k) plans, which offer 100% vesting, this Article is focused on 401(k) plans that adopt a

IRC in the Revenue Act of 1978.[28] These plans are regulated by the Department of Labor (DoL) and the Internal Revenue Service (IRS) through the Employee Retirement Income Security Act of 1974 (ERISA) and the IRC, with accompanying Treasury Regulations.[29] ERISA provides specific legal protections for participants in retirement plans. If the plan meets the requirements of the IRC, then it is considered "qualified" for tax purposes.[30] When a plan is qualified, employees are permitted to contribute part of their wages and accumulate earnings within the plan on a pre-federal tax basis,[31] and employers are permitted tax deductions for any contributions they make.

Employers indicate the types of contributions they will make in their 401(k) plan documents. Once contributed, these contributions are held in the plan trust so the money is used solely for the benefit of the plan participants and their beneficiaries.[32] A popular type of employer contribution is a "matching" contribution, in which an employer will match a certain percentage of an employee's own contributions. However, some 401(k) plans provide for other types of contributions as well.[33] Regardless of the type, these employer contributions must be vested before an employee is entitled to them.[34]

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vesting schedule, rather than those that immediately vest employer contributions. 401(k) plans are "qualified cash or deferred arrangements." Similar public sector plans are governed by § 457 and nonprofit sector plans are governed by § 403(b).

28. *See* Revenue Act, P.L. 95-600, Title I, Subtitle D. Sec. 135 (Nov. 6. 1978); and 26 U.S.C. § 401(k) *et. seq.*

29. 29 U.S.C. § 1001 *et. seq.*; 26 U.S.C. § 401 *et. seq.*

30. 26 U.S.C. § 401(a) *et. seq.* There are numerous requirements that must be met for a plan to be qualified. This Article primarily focuses on requirements that impact vesting and forfeitures.

31. Employees can also contribute on an after-tax basis and treat such a contribution as a Roth contribution.

32. 26 U.S.C. § 404(a).

33. Sometimes these contributions correspond to a set percentage of compensation or to the company's profits. They may also be discretionary and may vary from year to year based on the company's overall financial position.

34. If a person is partially vested, they are entitled to the portion that has vested at any given point in time.

Qualified 401(k) retirement plans offer numerous benefits to employees, such as tax savings and wealth accumulation[35] for either retirement or other permitted uses.[36] However, some plan provisions set forth rules that impact the depth of that wealth accumulation, for instance, vesting and forfeiture rules.

B. Vesting Schedules

When establishing a 401(k) plan, an employer can choose to either vest employer plan contributions immediately, or to select one of two minimum vesting schedules to be applied to those employer contributions. If an employer prefers, it can forgo selecting one of the permissible schedules, so long as it adopts a schedule that is at least as favorable to the employees as is one of the two permissible schedules.[37] This is to ensure that any modified schedule does not worsen an employee's position. Once contributions are vested, they become "nonforfeitable."[38] This section outlines the two main permissible vesting schedules and how they operate.

Vesting is based on a plan participant reaching a "year of service," often defined as 1,000 hours of service within a 12-consecutive-month period, which is typically the plan year.[39] Many plans also require that the employee be employed on the last day of the plan year.

The law provides minimum vesting schedules that can be used by qualified plans for employer contributions. These permissible schedules have become progressively more employee-friendly since their codification

35. Participants have the benefit of delayed income recognition until they start taking money out of the plan, for example, at retirement. 26 U.S.C. § 402(a); Treas. Reg. § 1.402(a)-1(a)(1)(i).

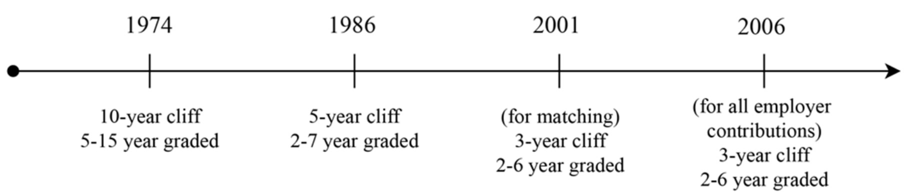
36. For example, plans can provide for hardship withdrawals or loans.

37. 26 U.S.C. § 411(a)(2)(B).

38. 29 U.S.C. § 1002(19). Once vested, participants have a legally enforceable right to the portion of their account that is vested. Amounts not vested will be forfeited. *See infra* Section II.C.

39. *See* 29 U.S.C. § 1053. Outside of the vesting schedule selected, employees must be 100% vested by the time they reach "normal retirement age," which is defined in the plan document. *Id.* Some plans provide for full vesting upon death or disability. Plan participants are also entitled to 100% vesting of their employer contributions if the plan terminates or experiences a partial termination. Samantha J. Prince, *Employee Turnover & Partial Plan Terminations*, *in* NEW YORK UNIVERSITY REVIEW ON EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION—2022 at 6-3 (David Pratt, ed., 2022).

in 1974.[40] In 1986, Senator Durenberger, seemingly ahead of his time, said: "The retirement plan coverage rules have been significantly broadened and the retirement plan vesting rules have been cut in half. As a result of these changes, more younger workers and working women will have greater economic security in their retirement years."[41] As can be seen *infra* Section V.B, eliminating vesting schedules altogether would improve the situations of marginalized workers. Such elimination seems to be a natural progression in retirement policy.



There are two general types of vesting schedules: cliff vesting and graded vesting. Cliff vesting means that the plan participant will vest 100% after a certain number of years of service but will have no vested balance before that is achieved, so the employee gets "all or nothing." Graded vesting means that the vesting occurs incrementally. The two minimum vesting schedules that serve as baselines for 401(k) plan employer contributions are three-year cliff and six-year graded.[42]

1. Three-year Cliff

Three-year cliff vesting holds that once a plan participant completes three full years of service, they will be 100% vested in employer contributions past and present. That means that until the participant completes those three full years of service, they are 0% vested in employer contributions. Said another way, the employee has no right to the employer contributions contributed on their behalf until and unless they complete those three years of service. But once they complete that third year of service, they will be vested in all employer contributions made before that time and after that time.

40. *See generally* RUSSELL K. OSGOOD, THE LAW OF PENSIONS AND PROFIT-SHARING 149 (1984).

41. 132 Cong. Rec. S13821-03, 1986 WL 793502.

42. 29 U.S.C. § 1053(a)(2)(B); 26 U.S.C. § 411(a)(2)(B).

Years of Service	Percentage Vested
1	0%
2	0%
3	100%

According to the Plan Sponsor Council of America (PSCA)'s 2020 Annual Survey of Profit Sharing and 401(k) Plans, 11.8% of plans surveyed use a three-year cliff schedule for matching contributions and 18.9% for non-matching contributions.[43] But these numbers increase significantly for plans with 5,000 or more participants, with 32% using a three-year cliff schedule for matching and 62% for non-matching.[44]

The numbers from a Vanguard report are somewhat similar. Ten percent of employers that used Vanguard's administration services in 2021 utilized a three-year cliff vesting schedule for their matching contributions, and 17% of them used this schedule for other employer contributions.[45] The Vanguard report only covers plans that it administers, but neither Vanguard's report nor the PSCA's report provide a complete picture of how many plans use this vesting schedule; this is why we need the government to collect more data from employers.[46] Despite these reports' limits, the data proves helpful, particularly when looking at plans with the largest numbers of participants.[47]

43. PLAN SPONSOR COUNCIL OF AMERICA , PSCA'S ANNUAL SURVEY OF PROFIT SHARING AND 401(K) PLANS: REFLECTING 2020 PLAN EXPERIENCE 40 (https://www.psca.org/research/401k/64thAR) [https://perma.cc/NQ5U-DC75]. PSCA surveyed 269 401(k) plans that may have a matching contribution and 246 401(k) "combination" plans that have a non-matching employer contribution (and may also have a matching contribution). *Id.*

44. *See infra* Section III.A.

45. VANGUARD, *supra* note 7, at 16. The percentage of Vanguard plan participants that were subject to three-year cliff vesting in 2021 were 9% for matching contributions and 23% for other contributions. *Id.* When Amazon was a client of Vanguard in 2019, the percentage of participants subject to plans with matching contributions was 14%. *See id.*; Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 30, 2020).

46. *See infra* Section V.A.

47. There were 103 PSCA plan survey respondents with 5,000 or more participants. This represented 19.9% of all plans surveyed. *See* PLAN SPONSOR COUNCIL OF AMERICA, *supra* note 43 at Table 1.

Two of Americans' top employers, Amazon and Home Depot, both of which are high-turnover businesses, use three-year cliff vesting.[48] In order to achieve vested benefits, workers must stay in the company's employ for three full years, and must log at least 1,000 hours of service in each year. Additionally, most of the companies who were early adopters of a 401(k) plan back in the early 1980s still use three-year cliff vesting today.[49]

2. Six-year Graded

Six-year graded vesting holds that a plan participant will start to vest incrementally once they have completed two years of service, and that they will not completely vest until they have completed six years of service. Therefore, if a plan participant leaves before completing two years of service, they will be 0% vested. If the plan participant leaves after completing four years of service, they will be vested 60% in their employer contributions. If the participant completes six years of service, they will be 100% vested for all prior and future contributions made on their behalf.

Years of Service	Percentage Vested
1	0%
2	20%
3	40%
4	60%
5	80%
6	100%

48. Amazon.com Servs., Inc., Annual Return / Report of Employee Benefit Plan (Form 5500) (Oct. 6, 2022); The Home Depot, Inc., Annual Return / Report of Employee Benefit Plan (Form 5500) (July 19, 2022).

49. Between 1979 and 1982, a handful of companies started 401(k) plans. These early adopters were Coates, Herfurth & England, FMV, Honeywell, Hughes Aircraft Company, JC Penney, Johnson & Johnson, and Pepsi Co.; *Fast Facts: History of 401(k) Plans: An Update*, EMP. BENEFIT RSCH. INST. 1-2 (Nov. 5, 2018), https://www.ebri.org/docs/default-source/fast-facts/ff-318-k-40year-5nov18.pdf [https://perma.cc/EU8E-C8KQ]. FMC Corp., Annual Return/Report of Employee Benefit Plan (Form 5500) (June 30, 2022); Honeywell Int'l Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (Aug. 15, 2022); Johnson and Johnson, Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 1, 2022); PepsiCo, Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (June 17, 2022).

The PSCA's survey shows that, in 2020, 15.7% of employers used this vesting schedule for matching contributions and 20.9% used it for other employer contributions.[50] Comparatively, in Vanguard's report, in 2021, 10% of employers used this vesting schedule for matching contributions and 19% used it for other employer contributions.[51] Notably, according to PSCA, six-year graded vesting is not used for matching contributions by any of the plans it surveyed with 5,000-plus participants.[52]

3. Other

Plans can use other vesting schedules so long as they provide quicker vesting for participants than the other similar type of schedule. For example, Comcast uses a two-year cliff vesting schedule[53] and Vail Resorts, Incorporated uses a four-year graded schedule.[54] Because these schedules provide for quicker vesting than the three-year cliff and six-year graded schedules, respectively, they are permissible. Vail's schedule looks like this:

Years of Service	Percentage Vested
1	25%
2	50%
3	75%
4	100%

After the three-year cliff schedule, the next most popular schedule for 5,000-plus participant plans is a five-year graded schedule for matching

50. *See* PLAN SPONSOR COUNCIL OF AMERICA, *supra* note 43, at 40 tbl.60.

51. VANGUARD, *supra* note 7, at 16. The percentage of participants that are subject to six-year graded vesting are 3% for matching contributions and 12% for other contributions. *Id.*

52. PLAN SPONSOR COUNCIL OF AMERICA, *supra* note 43, at 40 tbl.60.

53. Comcast Corp., Annual Return/Report of Employee Benefit Plan (Form 5500) (Sep. 30, 2022).

54. The Vail Corp., Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 7, 2022). Vanguard reports that in 2021, 3% of employers used the four-year graded vesting schedule for matching contributions and 2% used it for other employer contributions. VANGUARD, *supra* note 7, at 16. Vail did not use Vanguard as a plan administrator so is not reflected in that number.

contributions. Plans with 1,000-4,999 participants are much more apt to use a five-year graded schedule.[55]

C. Forfeitures

Once money is contributed to the plan, it becomes a plan-trust asset, and therefore it cannot come back out for the employer's general business use.[56] When employees terminate employment before their employer contributions are fully vested, the unvested amount will ultimately be forfeited from their accounts. These forfeited funds cannot aimlessly float around in the trust—the plan language must state what is going to happen to the forfeitures. While plan language can deviate somewhat, most plans reallocate forfeitures after the former employee incurs five consecutive one-year breaks in service or when the former employee voluntarily or involuntarily takes their vested money out of the plan, whichever occurs earlier.[57]

It is permissible for plans to provide that forfeitures be used to (1) reduce future employer contributions including corrective distributions,[58] (2) pay reasonable administrative expenses, (3) provide additional contributions to current participants,[59] and/or (4) restore previously forfeited participant accounts.[60] As mentioned above, the plan document

55. *See* PLAN SPONSOR COUNCIL OF AMERICA, *supra* note 43, at 40 tbl.60. 9.6% of plans with greater than 5,000 participants use this schedule whereas 24.4% of 1,000-4,999 participant plans use it. Although immediate vesting predominates (35.9% matching and 25.6% nonmatching), the six-year graded schedule is the most popular vesting schedule among the 1,000-4,999 participants plan size.

56. 29 U.S.C. §1103(a); 26 U.S.C. § 401(a)(2).

57. If a plan immediately forfeits upon a former employee's cash-out of their vested account balance, it has to permit the employee to restore their balance if they return within those five years which will restore the forfeited amounts as well.

58. *See* 29 U.S.C. § 1053(a)(1).

59. This choice requires specificity in the plan document as to the method of allocation, such as pro rata, and allocation eligibility requirements, such as a participant be employed on the last day of the plan year. It also requires awareness that the amount of forfeitures allocated to someone may be altered if it exceeds the annual additions limits.

60. Forfeitures can occur for other reasons, like if excess contributions cause the plan to fail nondiscrimination tests, or if a person is missing.

must state how forfeitures will be used. The plan does not need to select just one method but rather can allow the trustee the flexibility of selecting which method to use in any given year. So, if the plan allows all the above options, in any given year, a company could use a portion of the money to pay expenses, a portion to reallocate to other participants, and a portion to reduce future contributions. These forfeiture rules create a direct windfall to the employer by reducing a requirement to continue to fund or pay expenses with fresh money. And, when an employer chooses to distribute the forfeitures among current participants (choice three above), they are redistributing contributions that the employer likely made on behalf of lower-paid, high-turnover employees to employees who do not turnover and are likely higher paid.[61] This is because such reallocations are generally done based on the percentage contributed. Higher-paid employees generally save more by contributing higher percentages of their pay to their retirement plans.

Consider this: when a company contributes on behalf of an employee, and that employee terminates prior to fully vesting, unvested money is recycled and given to someone else. Say the company has a three-year cliff schedule and contributes $1,000 on *X*'s behalf. *X* then leaves after one-and-a-half years and is unvested. Employee *X* does not receive their employer contributions and that $1,000 then goes into the pot to be allocated to other employees. When a vesting schedule is used, the company can reuse forfeited employer contributions and save money by applying them to another participant. Conversely, instead of reallocating to other participants, the company could use the forfeitures to reduce employer costs such as administrative expenses or future contributions. Both scenarios are currently permissible. Bottom line, high-turnover companies are either shifting compensation and/or reducing compensation costs by using the 401(k) vesting schedules.

It is impossible with our current government data to precisely tie actual employee turnover to the amount of money forfeited. Forfeitures must be reallocated in the plan year that the forfeiture occurs; they are generally not allowed to be carried forward.[62] There is an exception that allows

61. Graetz, *supra* note 13, at 885-86 ("Strict vesting requirements reduce employer costs and further concentrate the tax advantages received by high-income employees."); Peter M. van Zante, *Mandated Vesting: Suppression of Voluntary Retirement Benefits*, 75 NOTRE DAME L. REV. 125, 201 (1999) (stating that non-highly compensated employees as a group will typically be composed of a disproportionately large fraction of high-turnover employees, and that highly compensated employees are typically ones who stay longer).

62. *See* Rev. Rul. 80-155, 1980-1 C.B. 84 and 84-156, 1984-2 C.B. 97.

forfeitures to carry over to the next plan year if forfeitures are used to reduce plan expenses or as employer contributions. Employers are required to file an annual plan report on Form 5500.[63] While Form 5500 requires disclosure of the amount of forfeitures during the plan year, and how they were applied, there is no way to drill down to determine how much was as a result of a five-year break in service or a result of immediate cash-out. Therefore, with the current disclosures it is impossible to specifically link employee turnover to forfeiture amounts.

D. Employer Rationale

The private retirement system is a voluntary system. It is voluntary for employers to offer plans like 401(k) plans. And employers choose plan attributes based on their needs and perhaps the needs of their employees.[64]

Why do some employers prefer vesting schedules? The answer is nuanced. Employers could be using vesting schedules to encourage employee retention. They could also be using vesting schedules to save on retirement plan costs. The decision whether to use a schedule squarely falls on the value to the business. "Is it more important to have immediate

63. "The U.S. Department of Labor, Internal Revenue Service, and the Pension Benefit Guaranty Corporation jointly developed the Form 5500 Series so employee benefit plans could utilize the Form 5500 Series forms to satisfy annual reporting requirements under Title I and Title IV of ERISA and under the Internal Revenue Code. The Form 5500 Series is an important compliance, research, and disclosure tool for the Department of Labor, a disclosure document for plan participants and beneficiaries, and a source of information and data for use by other Federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies. The Form 5500 Series is part of ERISA's overall reporting and disclosure framework, which is intended to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans." *Form 5500 Series*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500 [https://perma.cc/4NQN-DNVP].

64. ALICIA H. MUNNELL & ANNIKA SUNDÉN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 140 (2005); Borzi, *supra* note 12, at 15; DAVID CAY JOHNSTON, *supra* note 25, at 285–91 (2003) (discussing how "cutting costs" is not the only reason companies have switched from traditional pensions to 401(k) plans; other reasons include accounting and tax benefits).

vesting that's seen as a more valuable benefit by employees, or is saving some money for the employer more valuable?"[65]

Traditionally, people believed that vesting schedules incentivized a worker to stay longer or that vesting schedules rewarded loyalty.[66] Such a mindset continues in some circles today. In the fall of 2021, while at a family-owned hotel in Ithaca, New York, I had a conversation with one of the family members. They said with great pride that they were going to start a 401(k) plan. I asked what they are doing with vesting, and they responded that they will definitely have a vesting schedule because that is how they will "get people to stay longer." High turnover hurts their business, and this is what their financial advisor suggested they do.[67] Employers who seek to reduce employee turnover typically use vesting schedules to incentivize employees to stay.

Former U.S. Assistant Secretary of Labor for the Employee Benefits Security Administration Phyllis Borzi summarizes what was and continues to be the tension between retirement policy and employment policy: "On one hand, long vesting periods disadvantage mobile workers, because these workers are unlikely to qualify for benefits. On the other hand, shorter vesting encourages mobility, and that rightly concerns employers who depend on experienced workers to maintain productivity and profitability."[68] With the utmost respect to Borzi, I am not convinced that shorter vesting schedules truly *encourage* mobility. Longer vesting may *discourage* someone from leaving, but that does not necessarily mean the converse is true. Overall, we can agree that from the employer standpoint, "Companies don't want to provide benefits to people who will get up and

65. Judy Ward, *Has Vesting Gotten Controversial?*, PLANSPONSOR (July 8, 2022) https://www.plansponsor.com/in-depth/vesting-gotten-controversial/ [https://perma.cc/TD88-DBGQ].

66. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-69, 401(K) PLANS – EFFECTS OF ELIGIBILITY AND VESTING POLICIES ON WORKERS' RETIREMENT SAVINGS 26 (2016)

67. I suspect that this financial advisor is someone who will make more money on administrative fees if the business uses a vesting schedule rather than immediate vesting – which should be much cheaper to administer since there will be no forfeitures and no accounts that you are waiting for the expiration of five years of service in order to forfeit the money.

68. Borzi, *supra* note 12, at 33. *See generally* Alicia H. Munnell, *ERISA—The First Decade: Was the Legislation Consistent with Other National Goals?*, 19 U. MICH. J. L. REFORM 51, 53-55 (1985).

leave after a few months."[69] Along those lines, vesting schedules can be viewed as rewarding employees for loyalty.

Employee turnover is costly for most employers and recruiting takes time. Once employees are hired, employers must provide training and education which costs time and money. So the longer an employee stays, the better able the employer is to recoup its training costs.[70] However, in companies like Amazon, AI Human Resources and online training is prevalent and saves the companies money as compared to the recruiting and training costs that companies used to experience.

Overall, many employers benefit from employees who stay longer. Employees can benefit as well. If an employee stays longer, they will become more productive, thereby contributing to an increase in the employer's gains, which should ideally result in an increase in wages.[71] And, if the employee stays long enough, they conceivably will be fully vested in their employer contributions.[72] But using vesting schedules to reduce turnover—or to deter leaving—only works if employees understand the vesting policies.[73] Further, data indicates that a large amount of turnover is involuntary.[74] Use of vesting schedules by larger employers who have routine high turnover—and particularly those who perhaps invite that turnover—flouts the historical employee retention rationale underlying vesting.[75]

While I am not suggesting that companies instigate employee turnover to benefit from the forfeiture rules, they do in fact reap a financial benefit

69. Tim Grant, *Vesting That 'Free' 401(k) Retirement Money Lost If You Leave Too Soon*, PITT. POST – GAZETTE (Oct. 1, 2019) (quoting Dasha Brockmeyer, Esq., Saul Ewing).

70. van Zante, *supra* note 61, at 144.

71. *Id.* at 149.

72. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 66, at 22, 26. *See generally* Daniel Halperin, *Employer-Based Retirement Income—The Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37, 58 (2003) ("Although understandable from the perspective of an employer trying to reduce turnover, delayed vesting makes no sense from a retirement security perspective.").

73. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 66, at 26.

74. *Id.*

75. The focus here is on larger companies because of the volume of workers that turn over. A small-business exemption could apply to protect smaller businesses that have more deleterious effects from turnover. Small businesses are also more cost conscious and 401(k) plans cost money both in employer contributions and administrative fees.

related to retirement plan costs savings because of that turnover. No doubt some clever employee-benefits attorneys discovered this way to save on compensation costs where high turnover is already prevalent. As noted *supra* Section II.C, employee turnover creates forfeitures in plans that do not immediately vest employer contributions.[76] Many 401(k) plans provide that the employer may use forfeited funds to reduce administrative expenses or to reduce company obligations—typically employer matching contributions. "[V]esting policies reduce the direct cost of employer contributions for shorter-tenure employees who do not stay employed long enough to satisfy the vesting policy and keep employers' contributions."[77] Investment returns earned by contributions that are ultimately forfeited inure to the employer as well—the earnings become forfeitures.[78]

Congress has long touted that we should allow businesses to be able to decide what vesting schedule and plan provisions work best for their individual business or needs. Some say that ERISA should generally "be neutral" and not encourage employer plan decisions.[79] But how do these employer rationales jibe with an individual's need to have retirement savings? Let's look at what large companies are doing and see how it applies to low-paid and minority workers.

III. Large Company Vesting Schedules & Churn Impact on Retirement Savings

Remembering one of ERISA's objectives, "improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income," we should look directly at vesting schedules as they apply today to see if that objective is being met. Vesting schedules are pivotal in gauging whether a qualified retirement plan is fair and effective in *providing* retirement income because if a participant is not vested in their employer contributions, it does not matter how much the employer contributed on their behalf—they will not receive it.[80]

In the past two decades, certain companies have become megacompanies employing an extraordinary number of people. Amazon is

76. *See supra* Section II.C.

77. U.S. Gov't Accountability Off., *supra* note 66, at 25.

78. *Id.*

79. Borzi, *supra* note 12, at 16.

80. *See* Halperin, *supra* note 72, at 58, and accompanying text. Worse yet, their money may be shifted to another employee.

a good example of a megacompany. It continues to grow rapidly, employing 918,261 American workers in 2020[81] and 1,120,602 in 2021.[82] While the minimum vesting schedules Congress put into place in 2001 for matching contributions and in 2006 for other employer contributions were better than they had been originally,[83] they are not well-suited to today's workforce, given the huge number of people these companies employ and the high-turnover rates they have. It is time to phase out the use of vesting schedules, and we should start with the companies that have the most employees—the megacompanies.

In the case of Amazon, internal policies show that high turnover is somewhat deliberate, and this churn guarantees that employees will not vest in their employer contributions. Amazon's median tenure is one year.[84] And since an employee needs to work at Amazon for three years in order to vest, employees leaving after one year will be 0% vested in their employer contributions. Amazon knows this yet continues to list its 401(k) plan as one of its "robust benefits," duping employees, potential employees, and shareholders.[85] The plan meets the qualifications for a qualified plan but does not serve the vital role of providing retirement income to those who terminate as a result of high turnover. When it comes to Amazon's turnover, we can surmise that there are implications along racial lines and for lower-paid workers.[86] Amazon's plan is receiving tax qualified status and yet it contravenes the policy that retirement plans provide greater equality of treatment across different taxpayer groups—here the lower-paid workers who, in the case of Amazon's workforce, are predominantly people of color.

81. *2021 Employer Information Report EEO-1*, AMAZON, https://assets.aboutamazon.com/ff/dc/30bf8e3d41c7b250651f337a29c7/2021-amazon-consolidated-eeo-1-report-2p.pdf [https://perma.cc/38BH-XWKV].

82. *Id.*

83. *See supra* Figure 1.

84. *The Least Loyal Employees*, PAYSCALE (https://www.payscale.com/data-packages/employee-loyalty/least-loyal-employees) [https://perma.cc/KJK8-W2UF].

85. Letter from Andy Jassy, President and CEO, Amazon, to Amazon Shareholders (Apr. 14, 2022) https://www.aboutamazon.com/news/company-news/2021-letter-to-shareholders?campaign_id=9&emc=edit_nn_20220415&instance_id=58556&nl=the-morning&regi_id=96902683&segment_id=89295&te=1&user_id=f03e3e8c4ba4931f55658d5d433729a0 [https://perma.cc/QGR7-WY64].

86. *See supra* Part I and *infra* Section III.B.

Some high-turnover, large employers immediately vest employer matching contributions. Examples of these employers are Walmart and Lowes. Yet, do people notice this? One article which purported to list companies with "surprisingly great 401(k) plans" does not specify the vesting schedules for the companies listed.[87] Walmart indeed made the list but there was no mention of its plan's immediate vesting of employer contributions which is a significant, positive attribute of its plan. Costco was named in the title of the article, yet Costco, unlike Walmart, has a five-year graded schedule that does not start to vest the employee until after they have completed two years of service.[88] The Costco schedule is: 20% vested after two years of service, 40% after three years of service, 60% after four years of service, and 100% after five years of service.[89] This schedule is permissible as it offers faster vesting than the six-year graded, but is it really a "surprisingly great 401(k) plan"? No, it is not. Despite partially vesting over the employee's tenure, an employee would need to stay for five years to completely vest. If people are seeking information on the best benefits at companies when job shopping, articles that do not consider vesting—which is really just a way of saying, if you want this benefit, you are required to stay at the employer for *x* number of years—mislead the job seeker.[90] Company websites are also often deficient in that they add 401(k) benefits to their list of employee benefits but do not elaborate on plan details.

This Part covers which vesting schedules large employers are using and the impact of high turnover, including Amazon's deliberate churn rate.

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87. Barri Segal, *Costco and 23 More Companies with Surprisingly Great 401(k) Plans*, GOBANKINGRATES.COM (Sept. 1, 2021), https://www.gobankingrates.com/retirement/401k/companies-with-great-401k-plans/ [https://perma.cc/F6X2-4AHU].

88. Costco Wholesale Corp., Annual Return/Report of Employee Benefit Plan (Form 5500) (September 15, 2022).

89. *Id.*

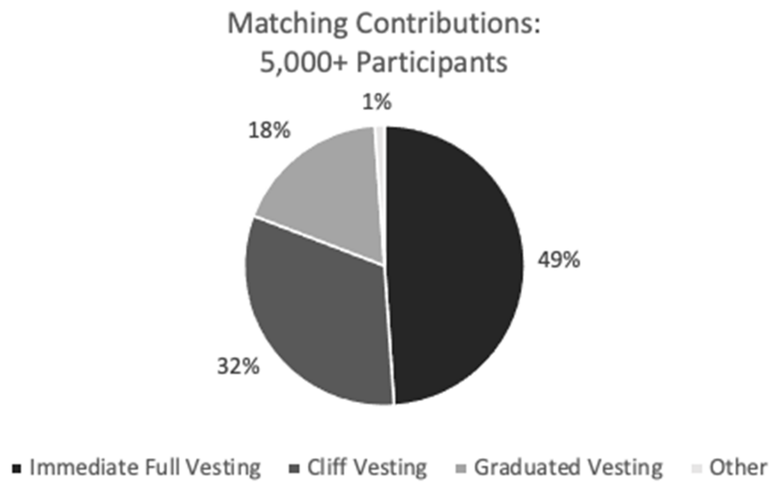
90. *But see*, Audrey McNay, *Ranking FAANG 401(k) Plans*, LEVELS.FYI (Dec. 15, 2020), https://www.levels.fyi/blog/ranking-faang-401k-plans.html, [https://perma.cc/L92R-37AB] (highlighting the importance of considering a plan's vesting schedule when choosing an employer); Erin Gobler, *Walmart's 401(k) Plan*, DAILY CAPITAL (Oct. 27, 2021), https://www.personalcapital.com/blog/retirement-planning/walmart-401k-plan/ [https://perma.cc/3XPR-2BV9] (discussing the details of Walmart's 401(k) plan).

A. Large Company Vesting Schedules

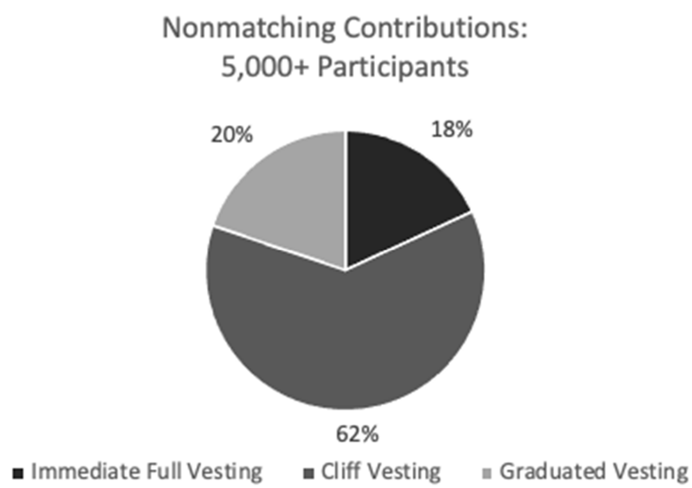
It is truly impactful to see how large companies are vesting their employer contributions. Some notably large companies are immediately vesting their employer matching contributions, e.g., Apple, Meta, Google, Lowes, Microsoft, Netflix, Walmart.[91] According to the PSCA survey, 48.9% of plans with 5,000 or more participants immediately vest their matching contributions but 32% use a cliff vesting schedule. (See Figure 1). Even with the high percentage of immediate vesting for matching, the number decreases significantly to 18% when it comes to non-matching contributions, where cliff vesting takes over with 62% and even graded schedules outnumber immediate vesting. (See Figure 2). A rationale for the difference lies within the notion of rewarding employee loyalty. The plan can provide immediate vesting for matching contributions and then have additional employer contributions to which a vesting schedule could apply. Applying the vesting schedule for these additional contributions could serve as a reward to those who stay. Such a combination, while it may skew toward higher-paid employees who churn less often, is a reasonable compromise.

There is a stark difference in vesting schedules for matching contributions used by plans with more than 5,000 participants and those with 1,000-4,999 participants. In plans with 1,000-4,999 participants, graded schedules hold the majority with 43%. (Figure 3). Another important observation is only 36% of plans with 1,000-4,999 participants use immediate vesting as compared to 49% of plans with 5,000-plus participants.

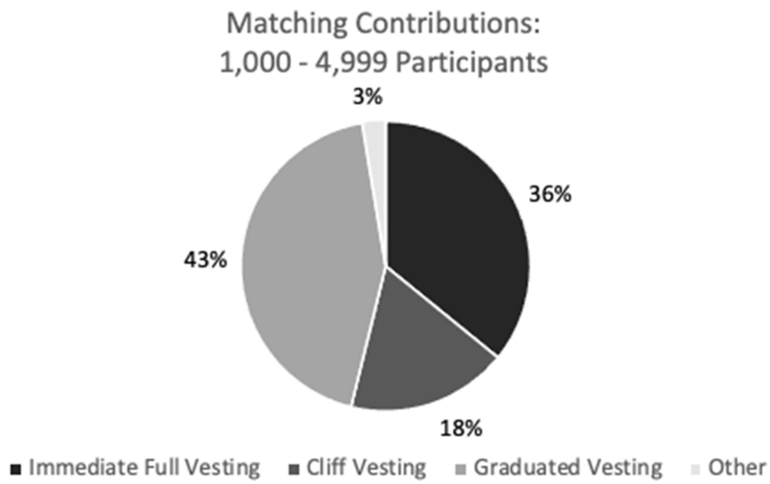
91. *See infra* Appendix 1.



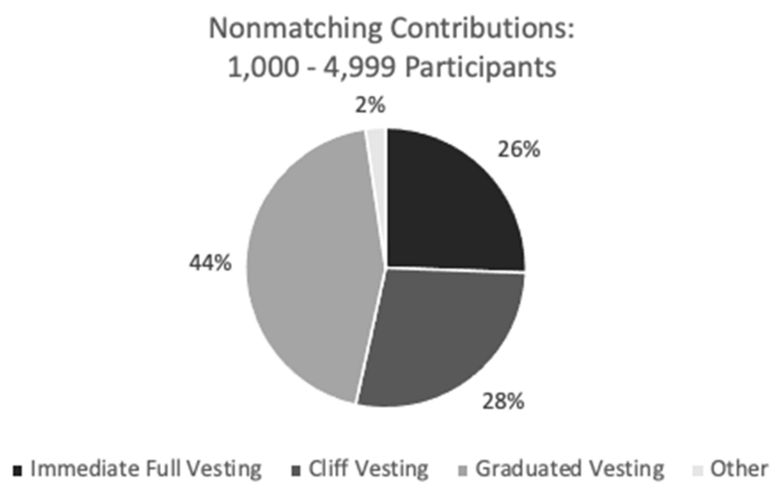
(Figure 1)



(Figure 2)



(Figure 3)



(Figure 4)

This data shows that most plans with a large number of participants employ vesting schedules and therefore more employees are vulnerable to losing benefits. Unless these individuals remain employed long enough to complete the vesting schedule, there will be forfeitures. These forfeitures will inure to the benefit of the company in the form of reduced compensation costs.

B. High Turnover and Amazon's Employee Churn

Many businesses have high turnover. The leisure and hospitality industry typically experiences the highest turnover rates.[92] The trade, transportation, and utilities industry, which is comprised of wholesale trade, retail trade, transportation, warehousing, and utilities also experiences rather high-turnover rates.[93] We can see such retail and warehousing turnover evidenced in part by looking at the Form 5500s for Home Depot and Amazon. In the years 2021, 2020, 2019, and 2018, Amazon reported that 236,751, 92,861, 34,181, and 26,864 plan participants terminated employment prior to vesting, respectively.[94] For 2021, 2020, 2019, and 2018, Home Depot reported 129,766, 68,638, 93,880, and 77,487 as having terminated prior to vesting.[95]

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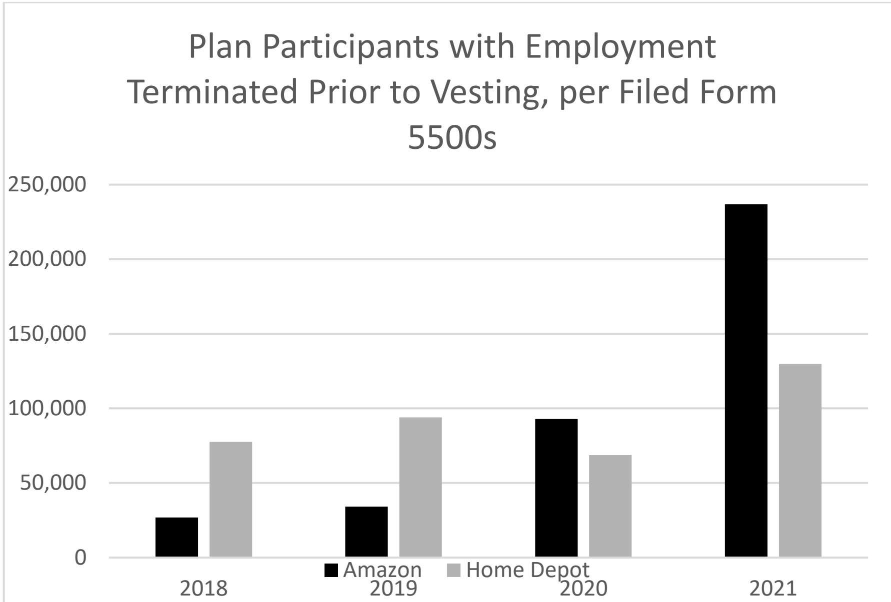
92. Press Release, Bureau of Lab. and Stats., Job Openings and Labor Turnover, (Oct. 4. 2022), https://www.bls.gov/news.release/pdf/jolts.pdf [https://perma.cc/9TY9-WL9K].

93. *Id.*

94. Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 02, 2019); Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 30, 2020); Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 8, 2021); Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 6, 2022).

95. The Home Depot Inc., Annual Return/Report of Employee Benefit Plan (Form 5500), (July 24, 2019); The Home Depot Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 31, 2020); The Home Depot Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 16, 2021); The Home Depot Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 19, 2022).



(Figure 5)

Those numbers represent many people who worked and contributed salary deferrals to the plan but will not receive *any* employer-contributed retirement benefits.[96] This practice shorts workers' retirement wealth accumulation. One could argue that the high 2020 and 2021 turnover is due to the COVID-19 pandemic.[97] But aside from the pandemic, Amazon and Home Depot have been reporting high turnover for years. Workers in these high-turnover businesses, predominantly low-paid and people of color, lose out on money for retirement when vesting schedules are used by employers with high turnover.[98]

96. Unless they return before incurring a five-year break in service.

97. *See* Benjamin Romano, *Amazon's turnover rate amid pandemic is at least double the average for retail and warehousing industries*, SEATTLE TIMES (Oct. 14, 2020) https://www.seattletimes.com/business/amazon/amazons-turnover-rate-amid-pandemic-is-at-least-double-the-average-for-retail-and-warehousing-industries/ [https://perma.cc/7QV2-UKGE].

98. Earlier Form 5500s show that these two companies have consistently high turnover of employees who terminate while under three years of service and therefore terminate with $0 in employer contributions. *See, e.g.*, Amazon.com Servs. Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 30, 2020); The Home Depot Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (July 31, 2020).

Turning to Amazon, founder and former CEO Jeff Bezos believed that having an "entrenched" work force would be a "march to mediocrity."[99] To reduce "entrenchment," guaranteed wage raises stopped after three years, incentivizing lower paid employees to leave or disincentivizing them to stay.[100] Amazon also "intentionally limited upward mobility for hourly workers."[101] To get as much out of employees as possible, Amazon has "time on task" requirements along with quotas and rigid rules that make warehouse working conditions intolerable.[102] This could be viewed as a bait and switch of sorts—Amazon promises 401(k) benefits as part of its compensation package to recruit employees knowing full well that there is a high probability that their workers will never realize those benefits due to its working conditions and policies to disincentivize workers to stay for three years.

It is notable that Amazon's unfair labor practices have been the subject of federal scrutiny through OSHA and the NLRB.[103] There have been state and private wage and hour cases as well.[104] And Amazon's workplace

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99. Kantor et al., *The Amazon That Customers Don't See*, *supra* note 1; Jason Del Rey, *Leaked Amazon memo warns the company is running out of people to hire*, VOX.COM (June 17, 2022) https://www.vox.com/recode/23170900/leaked-amazon-memo-warehouses-hiring-shortage [https://perma.cc/U69Y-SE7K].

100. Kantor et al., *The Amazon That Customers Don't See*, *supra* note 1. There were also other incentives offered, such as severance bonuses. *Id.*

101. *Id.*

102. *Id.*

103. *See* Jay Greene and Chris Alcantara, *Amazon Warehouse Workers Suffer Serious Injuries at Higher Rates than Other Firms*, WASH. POST (June 1, 2021), https://www.washingtonpost.com/technology/2021/06/01/amazon-osha-injury-rate/ [https://perma.cc/DV26-74JB]; Annie Palmer, *Amazon Settles with Two Employees Who said they were Fired over Activism*, CNBC (Sept. 29, 2021), https://www.cnbc.com/2021/09/29/amazon-settles-with-employees-who-said-they-were-fired-over-activism.html [https://perma.cc/Q2CT-HLWJ]; Anne D'Innocenzio, *Amazon Settles with NLRB to Give Workers Power to Organize*, ASSOCIATED PRESS, https://apnews.com/article/business-national-labor-relations-board-523e6836eeb618755e44a4d9454592ef (Dec. 23, 2021) [https://perma.cc/6QB9-3KPB].

104. Press Release, Dep't of Indus. Rels., State of California, California Labor Commissioner Cites Delivery Companies More than $6 Million for Wage Theft Violations, (Mar. 8, 2021), https://www.dir.ca.gov/DIRNews/2021/2021-27.html [https://perma.cc/DT7T-WG6S]; Melissa Angell, *$13M Deal Ends*

conditions were called into question by Senators Marco Rubio and Sherrod Brown.[105] In late December 2021, these senators penned a letter urging Secretary of Labor Marty Walsh to investigate Amazon's labor practices:

> Recent reports have brought to light troubling working conditions at Amazon that suggest improper treatment of its employees, to the detriment of workers and families across the country. While U.S. labor and employment laws should always be vigorously upheld, Amazon's size and scope necessitate particular scrutiny by federal regulators when widespread and credible allegations of labor and employment law violations surface.[106]

The Senators cited "serious concerns regarding Amazon's employment practices" and that "Amazon's business practices seem to prioritize profit over people."[107] And while not being used in the context of retirement benefits and vesting, the Senators' statement "Amazon's size and scope necessitate particular scrutiny by federal regulators" should apply to scrutinizing the impact of churn policies in tandem with vesting schedules.

Employee churn policies and high turnover combined with a three-year cliff schedule ensures that the money contributed on employees' behalf is forfeited to the companies' benefit—either to reduce further contributions or to put toward administrative expenses. Therefore, for all the Amazon employees that terminate within a year or two, the money that was contributed by Amazon on their behalf will be reallocated elsewhere to save Amazon money despite not leaving the trust.

Is there a point at which Amazon's churn policies become a violation of ERISA? ERISA Section 510 provides, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ."[108] Therefore, Section 510 prohibits employers from terminating employees to avoid vesting their

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Amazon Wage MDL that Went to High Court, LAW360 (July 23, 2021), https://www.law360.com/articles/1405839/-13-5m-deal-ends-amazon-wage-mdl-that-went-to-high-court (on file with author).

105. Letter from Sens. Rubio and Brown, *supra* note 3.

106. *Id.*

107. *Id.*

108. 29 U.S.C. § 1140; Ira H. Goldman, *A Poet's Guide to Employee Benefits Law*, SHIPMAN & GOODWIN LLP 47 (2017) https://www.shipmangoodwin.com/a/web/7vAguSgrEr73dDRr5NKyxB/Xbww5/40720_2017_Poets_Guide.pdf [https://perma.cc/RVA5-256M].

benefits.[109] To win a case under Section 510, a plaintiff "need not show that 'the sole reason for his [or her] termination was to interfere with pension rights'; however, the plaintiff must show that the employer had the 'specific intent to violate ERISA.'"[110] The evidentiary hurdle is substantial and as of this writing, plaintiffs have lost more cases than they have won.[111]

Do workers who escape intolerable working conditions have any similar recourse when they leave before their benefits are vested? Is there an argument to be made under constructive discharge theory?

The Code also contains a provision to protect employees. IRC § 411(d)(1)(A) provides:

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109. 29 U.S.C. § 1140. For an example of a successful claim of intentional firing before meeting the ten-year vesting required to receive benefits in a defined benefit plan, see *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir. 1992). *See also* van Zante, *supra* note 61, at 173.

110. *Olitsky*, 964 F.2d at 1478 (quoting *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988)).

111. *See, e.g.*, *Hendricks v. Edgewater Steel Co.*, 893 F.2d 385, 389 (3d Cir. 1990) (holding that the employee failed to meet his burden of persuasion of intent to discriminate despite being eleven months short of vesting); *Humphreys v. Bellaire Corp.,* 996 F.2d 1037, 1044 (6th Cir. 1992) (holding that the employer presented a separate, legitimate reason for discharge despite employee being two months short of vesting at time of termination); *Unida v. Levi Strauss Co.*, 986 F.2d 970, 980 (5th Cir. 1993) (determining the employee's evidence that their employer interfered with entitlement to ERISA benefits, which included evidence suggesting that 369 employees had less than five years from becoming fully vested, to be speculative); *Duvall v. Polymer Corp.*, 1995 U.S. Dist. LEXIS 14413, at *42 (E.D. Pa. Sept. 28, 1995) (holding that the employee's evidence of being only one year from the vesting of his pension to be "wholly insufficient alone to establish the existence of a prohibited specific intent"); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 963–65 (8th Cir. 1996) (holding that the employee did not present sufficient evidence of intent to interfere with his pension rights even though he was approximately 3.5 months short of vesting); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1115 (2d Cir. 1998) (holding that employer presented sufficient evidence to defeat summary judgment despite employee's evidence that his discharge occurred four months and seven days prior to the vesting of basic pension rights); *Haynes v. BIS Frucon Eng'g*, 2009 U.S. Dist. LEXIS 31709, at *19–24 (E.D. Miss. Apr. 14, 2009) (finding that the employee's claim would not succeed regardless of the fact that it was time-barred because he could not establish a prima facie claim of ERISA interference even with evidence that he was terminated approximately two months before vesting).

> A plan which satisfies the requirements of this section shall be treated as satisfying any vesting requirements resulting from the application of section 401(a)(4) unless there has been a *pattern of abuse* under the plan (such as a dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are highly compensated employees.[112]

The "pattern of abuse" language appears to open the door to the possibility that even if a vesting schedule is permissible, the plan can be disqualified if it is operated in a way that is abusive.[113] Do deliberate employee churn policies qualify as a "pattern of abuse" under § 411(d)(1)(A)? It is possible that this query opens a Pandora's box unnecessarily because ERISA § 510 could cover such scenarios. Additionally, participants who are harmed may not actually bring suit given the costs of litigation and the fact that they may be just as happy cashing out what they saved themselves.[114] However, it is an interesting curiosity when one looks to past Revenue Procedures.

In 1975, a Revenue Procedure (Rev. Proc.) outlined a "turnover test" to determine whether a plan could be discriminatory for purposes of obtaining an advanced determination letter. The test compares the turnover rate of lower-paid (rank-and-file) workers with that of officers, shareholders, and higher-paid workers.[115] Because a large number of employers commented that they would not be able to show compliance with Rev. Proc. 75-49, its replacement, Rev. Proc. 76-11, still included the turnover test but added alternative disjunctive tests that could be met instead.[116] Then in 1989, Rev. Proc. 89-29 stated that the tests in Rev. Procs. 75-49 and 76-11 would no longer apply.[117] Instead, vesting schedules would be deemed to provide a rapid enough rate of vesting for purposes of an advance determination letter unless there had been a pattern of abuse or actual misuse in the

112. Emphasis added.

113. *See generally*, Russell K. Osgood, *Qualified Pension and Profit-Sharing Plan Vesting: Revolution Not Reform*, 59 B.U. L. REV. 452, 462 (1979).

114. These are questions for future research.

115. Rev. Proc. 75-49, 1975-2 C.B. 584 ("The requirements of this paragraph are satisfied if the rank and file turnover rate (see section 4.02) for the 60-month period ending on the last day of the pre-application year (see section 5.05), or for the relevant employment period if shorter, does not exceed the greater of (i) 6 percent . . . .")

116. Rev. Proc. 76-11, 1976-1 C.B. 550. *See* Osgood, *supra* note 113, at 463.

117. Rev. Proc. 89-29, 1989-1 C.B. 893.

operation of the plan.[118] The Revenue Procedure solely addresses whether a plan determination letter should be granted, and does not address the actual determination of whether a pattern of abuse has occurred.[119]

Due to business pushback citing administrative burden, the turnover test has been eliminated. Perhaps though, comparing turnover of lower-paid workers (e.g., warehouse workers) with higher-paid workers (e.g., executive officers, etc.) should be brought back to help determine patterns of abuse.

Amazon should not be able to get away with creating impossible working conditions to churn through workers. But the harm is compounded when one considers that the company is effectively sabotaging the retirement system by using a three-year cliff vesting schedule that disparately leaves lower-paid workers and people of color without the employer contributions they could have been entitled to had they been able to stay at the company. An employee might reasonably claim that Amazon's labor practices and quotas intentionally reduce Amazon's costs and favor other employees.[120] Instead of requiring that employees prove a violation of Section 510 or IRC § 411(d)(1), it would be much more efficient, fair, and timely to require such businesses to use immediate vesting.[121]

IV. RETIREMENT WEALTH INEQUALITY

"Most employees have a very limited understanding of their retirement benefits in general and about conditions which might cause forfeiture in particular."[122]

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118. *Id.*

119. *Id.* ("This revenue procedure applies solely for purposes of advance determination letters, and therefore does not apply in cases where the qualified status of a plan or trust under section 401(a) or 403(a) of the Code is determined upon examination of its operations. This revenue procedure also does not apply in determining whether there has been a pattern of abuse under a plan (such as the intentional dismissal of employees to prevent vesting) or actual misuse in the operation of a plan which affects the qualified status of the plan or trust.")

120. Kevin Long, *ERISA Section 510 Claims*, EMP. BENEFITS L. GRP., PC (July 6, 2016), https://www.employeebenefitslawgroup.com/erisa-section-510-ripe-for-claims/ [https://perma.cc/47YF-V53A].

121. Granted, it would be even better if labor practices were appropriate and these kinds of issues never had to be raised.

122. van Zante, *supra* note 61, at 174.

Eliminating vesting schedules—at least for large, high-turnover employers—would help mitigate generational wealth inequality and financial illiteracy, two factors that lead to retirement wealth inequality.[123] In particular, immediate vesting would provide more money for investment.

A. Generational Wealth Inequality

Inter-generational wealth is a main driver of retirement wealth inequality. "The ability to transfer wealth intergenerationally helps subsequent generations of White families build wealth through large financial gifts and inheritances more so than families of color."[124] People of color have been subjected to decades of systemic racism via discrimination and exploitation that leaves many of them (and as was the case with their elders) in a lower economic echelon than some white households.[125] The racial wealth gap has remained significant over the last seventy years.[126] Significant pay disparities still exist, and for Black women, the intersection of race and gender bias has exacerbated income and wealth gaps even more.[127] Additionally, due to decades of systemic racism, many Black

123. I would recommend requiring non-matching contributions for individuals of lower-incomes as well, but that could be the topic of another article.

124. Francis & Weller, *supra* note 16, at 2; Bhutta et. al, *supra* note 19 ("Nearly 30 percent of White families report having received an inheritance or gift compared to about 10 percent of Black families, 7 percent of Hispanic families and 18 percent of other families . . .[W]hite families also tend to receive larger inheritances.").

125. *See* Janis Bowdler & Benjamin Harris, *Racial Inequality in the United States*, U.S. DEP'T OF THE TREASURY (July 21, 2022), https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states [https://perma.cc/YJN8-K9VJ].

126. Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30101, 2022).

127. Christian E. Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. FOR AM. PROGRESS (Dec. 5, 2019), https://www.americanprogress.org/article/african-americans-face-systematic-obstacles-getting-good-jobs [https://perma.cc/8XZR-B7GN] ("[Black people] continue to face systematically higher unemployment rates, fewer job opportunities, lower pay, poorer benefits, and greater job instability." "[Black] women also work in lower-paying jobs than Black men

women and men who do have a good salary have to financially support parents, siblings, grandparents, and other relatives—all of which takes away the ability to contribute to their own retirement.[128]

While data indicates disparities along racial lines, there are low-income whites who occupy socio-economic disadvantaged status who are also in precarious positions. Low-income and agricultural workers are less likely to have parents who saved for retirement. This is also true for women who face wage inequity and who may have work gaps while serving as primary care-givers for family elders. As such, the responsibility of financially supporting familial elders falls on those who are still working. Since Social Security is not enough to support those relying on it, these workers struggle to save for their own retirement.[129]

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or white women, which translates to a particularly steep pay gap for Black women.").

128. *See* Beverly I. Moran and William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751, 791 (1996) ("Because of the differential wealth of blacks and whites with similar incomes, it may be more burdensome for blacks to voluntarily defer receipt of income. Thus, blacks benefit relatively little from the availability of 401(k) plans . . . ."); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 73 (6th ed. 2022) ("[R]esearchers conclude . . . that it will be 'extraordinarily difficult for Blacks to make up significant ground relative to Whites with respect to wealth' because of their much lower rates of inheritance, lower incomes and the fact that much of their economic assets lie in home equity."); DOROTHY A. BROWN, THE WHITENESS OF WEALTH 152 (2021) (noting that "Black college graduates . . . are more likely to provide financial support to their parents, while white college graduates are more likely to receive financial support *from* their parents."; also noting that Black people who have 401(k) account balances are five times more likely to make a hardship withdrawal than whites, which reduces retirement wealth).

129. Nancy Altman & Eric Kinson, *Social Security Reduces Inequality—Efficiently, Effectively, and Fairly*, *in* DIVIDED: THE PERILS OF OUR GROWING INEQUALITY 250, 258 (David Cay Johnston ed., 2014) ("Americans today face a serious retirement-income crisis. Data published by the Retirement Research Center at Boston College suggest that nearly two-thirds of today's workers will be unable to maintain their standards of living in retirement, even if they work until age sixty-five. Nevertheless, political and media elites seem to think that still larger cuts are sensible—both for today's and tomorrow's beneficiaries—and only a courageous few have voiced the need to expand, not cut, Social Security.").

Being economically strained leaves marginalized individuals in an impossible situation to save for retirement, and since many 401(k) plans match an employee's contribution, those who cannot contribute lose out on matching contributions—"free money," as it is often termed. When socio-economically disadvantaged workers can scrape money together to save, if their employer uses a vesting schedule for its matching contributions, the employee is more vulnerable because there is no guarantee that they will be able to continue in their job to completely vest. And job stability is lower for low-income workers, exacerbating retirement wealth insecurity.[130]

We cannot go back in time and reverse generationally accrued retirement wealth. But we can acknowledge that inequality has been an issue and take measures to minimize and ultimately resolve it. It is harder to accumulate wealth when there is less money to start with and when one has to support elders or other family members. Certainly, immediate vesting cannot solve all that impacts the accumulation of wealth but vesting immediately *will* give workers rights to all their compensation, and as such will give workers more money to save that can compound into retirement wealth.

B. Financial Illiteracy

Financial literacy is not a sideshow . . . it plays a critical role in saving and wealth accumulation.[131]

Defined contribution plans, including 401(k) plans, rely on employees' ability to invest their account balances to grow. ERISA contains fiduciary duties for employers and plan administrators regarding investment decisions, but section 404(c) protects them from liability for investment losses incurred when participants are offered a certain range of diverse options and the ability to make changes to their investments.[132] Therefore,

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130. *See* Francis & Weller, *supra* note 16, at 10.

131. Annamaria Lusardi, *Financial Literacy and the Need for Financial Education: Evidence and Implications*, 155:1 SWISS J. ECON. & STAT. 1, 5 (2019).

132. 29 U.S.C. § 1104(c)(1)(A). The three requirements that establish the safe harbor that protects plan fiduciaries based on the participant's ability to control are: (1) that the plan offers participant control, (2) that the participant actually exercises control, and (3) that the losses result from the participant's exercise of control. *See* Anne Tucker, *Retirement Revolution: Unmitigated Risks In The Defined Contribution Soci*ety, 51 HOUS. L. REV. 153, 204 (2013). *See also*

most plans provide participants the ability to choose, thereby shifting the responsibility of retirement planning to participants—the "individual responsibility model."[133] When it comes to accumulating retirement wealth, the ability to choose certainly helps those who know how to invest and are financially literate, but it can widen the gap for those who are financially and investment illiterate.

Financial literacy is associated with higher returns on investments and therefore correlates to an increase in retirement wealth accumulation.[134] Thirty to forty percent of retirement wealth inequality can be accounted for by differences in financial knowledge.[135]

Financial illiteracy and its negative impact on retirement savings has been researched by several scholars and researchers.[136] Some have called

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Kathryn L. Moore, *Regulating Investment Advice for 401(k) Plan Participants: Is More Investment Advice the Answer?*, NYU Review of Employee Benefits and Executive Compensation, 5-6 (2010).

133. *See* Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 4 (2000).

134. In this Article, the term "financial literacy" incorporates both financial and investment literacy. Lusardi, *supra* note 131 at 5.

135. *Id. See also* James J. Choi, David Laibson, & Brigitte C. Madrian, *$100 Bills on the Sidewalk: Suboptimal Investment in 401(k) Plans*, 93(3) REV. OF ECON. AND STAT. 748, 752 (2011) (Another factor that negatively impacts retirement savings occurs when participants do not take full advantage of their matching contributions, i.e., individuals do not contribute enough to receive the maximum matching possible. When surveying plan participants for financial literacy in the context of choosing whether to max out their matching contributions, "these individuals appear to have high indirect decision-making costs, as they are much less financially sophisticated and knowledgeable about their firm's 401(k) plan.")

136. Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 17108, 2011), https://www.nber.org/papers/w17108 [https://perma.cc/G47B-MKEQ] ("[P]eople who score higher on the financial literacy questions are . . . much more likely to plan for retirement."); Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 741 (2020) ("[E]mployees are poorly equipped to make decisions about how to invest for retirement."); Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. ON LEGIS. 53, 59 (2012); *see also* Annamaria Lusardi & Peter Tufano, *Debt Literacy, Financial Experiences, and Overindebtedness* (Nat'l Bureau of Econ. Research, Working Paper No. 14808, 2009); Jill E. Fisch, Tess Wilkinson-Ryan & Kristin Firth, *The*

for "employer-provided financial education to address limited employee financial literacy"[137] because we are requiring particularly "vulnerable

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Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors, 66 DUKE L.J. 633, 633-34 (2016) (discussing results that suggest employees often lack the skills necessary to support participant-directed investing. "We show that less knowledgeable participants allocate too little money to equity, engage in naïve diversification, fail to identify dominated funds, and are inattentive to fees."); David Pratt, *Too Big to Fail? The U.S. Retirement System in 2019*, 27 ELDER L.J. 327, 350 (2020) (calling for simplification of plan participant communications to achieve a higher level of understanding.); F. Douglas Foster, Juliana Ng & Marvin Wee, *Presentation Format and Financial Literacy: Accessibility and Assessability of Retirement Savings Statements*, 49:3 J. OF CONSUMER AFFS. 519, 519 (2015) (suggesting that placement of important information on participant statements can improve investment outcomes and augments the benefits of financial literacy); Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415 (2009).

137. Fisch, Lusardi, & Hasler, *supra* note 136, at 741 (arguing for mandatory employer-provided financial education.); Robert Clark, Annamaria Lusardi & Olivia S. Mitchell, *Employee Financial Literacy and Retirement Plan Behavior: A Case Study* (Nat'l Bureau of Econ. Research, Working Paper No. 21461, 2015) (The authors performed a case study on employees at the U.S. Federal Reserve System that revealed employees who partook in an employer-provided financial literacy learning module were more likely to contribute. This education also led to significant changes in retirement planning behavior and better-performing investment portfolios.); Kim Blanton, *Americans Say They Need a Finance Class*, CTR. FOR RET. RSCH. (May 24, 2022) (The National Endowment for Financial Education requested that four economists conduct a meta-analysis of 76 studies in 33 countries to determine the effectiveness of a variety of financial lessons, including a lesson for workers on 401(k) investments. Researchers found that after learning about tax consequences, workers answered more questions about 401(k)-style and Roth retirement accounts correctly. The researchers ultimately concluded that "financial education improves financial knowledge and financial behaviors"); *see also* Robert L. Clark, Melinda S. Morrill & Steven G. Allen, REORIENTING RETIREMENT RISK MANAGEMENT ED. ROBERT L. CLARK & OLIVIA S. MITCHELL 41-53 (2010) (studying whether employer-provided programs are effective in increasing financial literacy showed encouraging results of increased knowledge regarding retirement programs). *But see* Lauren E. Willis, *Alternatives to Financial Education*, *in* THE ROUTLEDGE HANDBOOK OF FINANCIAL LITERACY 1, 9 (Gianni Nicolini & Brenda J. Cude, eds., 2021) (arguing that financial education is likely to fail for several reasons, one being that "the financial industry is well-positioned to exploit limitations on consumer rationality and willpower.").

people to make financial choices that they are ill-equipped to make."[138] "Plan participants are notoriously poor investors."[139]

Financial illiteracy is more evident in "women, African Americans, Latinos, those with less education, and those with lower incomes."[140] Professor Fisch's study found that individuals with college or higher degrees are more likely to be actively investing both in their 401(k) plans and in other financial accounts.[141] The study also showed that women are less likely to be active investors in retirement or other financial accounts.[142]

138. Fisch, Lusardi, & Hasler, *supra* note 136, at 741-43 (noting alarming financial illiteracy figures when comparing workers whose exclusive experience with investing is through their 401(k) against workers who invest outside of their 401(k).). Notably only half of the "workplace-only investors" had a rudimentary understanding of risk diversification. *Id.* at 762. *See also* Pratt, *supra* note 136, at 350 (recommending reducing redundant investment options to make it easier for participants to create a well-balanced portfolio and suggesting that the U.S. Department of Labor intensify its investment educational efforts.).

139. Moore, *supra* note 132, at 5-6; ROBERT L. CLARK & OLIVIA S. MITCHELL, REORIENTING RETIREMENT RISK MANAGEMENT 2 (2010) ("[T]there is mounting evidence that many employees lack basic information about their retirement plans and financial mathematics.").

140. Schwartz, *supra* note 136, at 66. *See* Fisch, Lusardi, & Hasler, *supra* note 136, at 763 ("[W]orkplace-only investors are much more likely than other investors to be people with lower income and less education, those with split families (divorced/separated), and women."); Lusardi & Mitchell, *supra* note 136 at abstract ("Hispanics and African Americans score the least well on financial literacy concepts."); Lusardi, *supra* note 131 at 4 (discussing that women in all surveyed countries have lower financial literacy than men); Monique Morrissey, *The State of American Retirement Savings,* ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/the-state-of-american-retirement-savings [https://perma.cc/WJT8-D5L2].

141. Fisch, Lusardi, & Hasler, *supra* note 136, at 767. *But see* Annamaria Lusardi & Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence*, 52 JOURNAL OF ECON. LIT. 1, 5 (2014) (stating that having higher education is positively correlated with financial literacy, but well-educated people are not necessarily savvy about money).

142. Fisch, Lusardi, & Hasler, *supra* note 136, at 767; *see* Gary Mottola, *Gender, Generation and Financial Knowledge: A Six-Year Perspective*, FINRA INV. EDUC. FOUND. INSIGHTS: FIN. CAPABILITY 1 (March 2018), https://www.finrafoundation.org/sites/finrafoundation/files/Issue-Brief-Gender-Generation-and-Financial-Knowledge-A-Six-Year-Perspective_0_0_

And that those with incomes above $100,000 are more likely to be investors than those under that wage band.[143] Importantly, this study suggests that even when women are exposed to managing their 401(k) plan assets, they still fall short of closing the gender gap in knowledge.[144]

Not knowing how to invest or the benefits of monitoring one's 401(k) investments hinders wealth accumulation.[145] The gap is exacerbated by requiring that those with lower investment literacy choose their 401(k) investments.[146] "[B]illions [are] wasted through poor investment choices."[147] "Limited financial literacy suggests a level of incapacity that renders true employee choice illusory."[148] Those who are already struggling economically and are financially illiterate will not accumulate enough in 401(k) wealth to make a difference upon retirement. This widens economic disparity and raises issues of fairness.[149] "[T]he current paradigm operates as a wedge, bestowing further advantages on those who are already fortunate while allowing others to fall further behind. As such, it contributes to the gross economic stratification that marks society today."[150]

0_0.pdf [https://perma.cc/6XVA-U9US] ("Women consistently score lower than men on financial literacy measures, and this gender-based gap may negatively impact women's long-term financial well-being.").

143. Fisch, Lusardi, & Hasler, *supra* note 136, at 767; *see also* Schwartz, *supra* note136, at 73 ("Economically disadvantaged groups . . . are the most likely to make poor investment decisions."). *But see* Lusardi & Mitchell, *supra* note 141, at 5-44.

144. Fisch, Lusardi, & Hasler, *supra* note 136, at 767 n.100.

145. *Id.* at 743 ("People with low financial literacy are susceptible to a variety of investment mistakes, including choosing products that do not meet their needs and paying excessive fees."); Mottola, *supra* note 142, at 3 (explaining that access to financial education likely explains one of the reasons women have less financial literacy than men).

146. *See generally* Fisch, Wilkinson-Ryan, & Firth, *supra* note 136, at 633, 633 n.100 (explaining that mistakes emanating from financially illiterate investment choices "can cost investors hundreds of thousands of dollars.")

147. Schwartz, *supra* note 136, at 66.

148. Fisch, Lusardi, & Hasler, *supra* note 136, at 772.

149. Schwartz, *supra* note 136, at 66.

150. *Id.* at 73; *see* Chang-Keun Han, Michal Grinstein-Weiss & Michael Sherraden, *Assets Beyond Saving in Individual Development Accounts*, 83 SOC. SERV. REV. 221, 221 (2009).

Financial illiteracy negatively impacts one's ability to accumulate retirement wealth as well. While immediate vesting cannot solve financial illiteracy, immediate vesting will significantly simplify and shorten participant statements. Such simplification will lead to better overall understanding of what one actually owns or is entitled to. Not all participants understand—or care to understand—the concept of vesting,[151]so doing away with schedules altogether would be helpful.

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Certainly, reducing generational wealth inequality and financial illiteracy will be instrumental in closing the retirement wealth gap and providing some retirement security. Faster vesting will significantly aid in this endeavor. It is a corollary that if an employee starts with more money, then the money will compound into a larger amount by the time of retirement.[152] Essentially, the employee will have more they can invest. Lower-income individuals and those in high-turnover jobs are missing out on the additional funds through their 401(k) employer contributions when vesting schedules keep them from vesting. They are beginning at a starting point that is much less than those employees who stay to vest. Hence, these workers, particularly those in high-turnover jobs when they are not there long enough to vest, are missing out on important funds to help them prepare for retirement. It is important to pause here to remember that sometimes employees leave for employer-related reasons, like Amazon's deliberate churn policies.

Employees benefit from employer contributions, and "vesting rates correlate strongly with earnings levels."[153] Account balances, even when they start out small, grow over time,[154] and compounded growth will ultimately be higher if employer contributions are added to a participant's account. Having something to compound is better than having nothing to compound. For example, if an employee makes $20 an hour and works for 2,000 hours, they are earning $40,000 pre-taxes. If this employee saves 4% of their earnings, or $1,600, and if the employer matches 50% of employee

151. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 66, at 26; van Zante, *supra* note 61, at 174; DAN M. MCGILL, PRESERVATION OF PENSION BENEFIT RIGHTS 102 (1972).

152. BIRDTHISTLE, *supra* note 21, at 144-45 (discussing the direct benefits of matching contributions and compounding).

153. Regina T. Jefferson, *Increasing Coverage in Today's Private Retirement System*, 6 DREXEL L. REV. 463, 474 (2014).

154. BIRDTHISTLE, *supra* note 21, at 144-45.

contributions, there will be an additional $800 added to their account balance.[155] However, remember that this employee has to complete three years of service (and may even have to be an employee on the last day of year three) in order to be vested in this amount.[156] Here is where the problem lies. If this employee leaves before that third year of service—or does not log 1,000 hours in each of those three years—they will only walk away with their own contributions (plus earnings) and not the employer contributions. While on its face this may seem like a neutral policy, systematically it flouts ERISA's intent to provide greater equality of treatment to different taxpayer groups because the workers in this position in high-turnover companies are the low-paid workers and people of color that need every dollar.

One of the other core policies of ERISA—assuring individuals who have done socially productive work will have adequate incomes to meet their needs when they retire—cannot be ignored. Women, Black people, Latinx people, and low-paid workers tend to change jobs more frequently.[157] This makes it harder for them to become vested in plans where vesting schedules are being used, and therefore harder for them to accumulate retirement wealth. It is a travesty that these workers are being foreclosed from partaking in employer contributions—compensation that should be rightfully theirs. Companies that use workers that they know will turn over before becoming vested should be required to immediately vest their contributions. This is especially true of companies that deliberately churn these employees. This policy is not being met for these individuals.

As much as I would like to say that immediate vesting would undeniably result in shrinking the retirement wealth gap, there are some who will cash out their retirement benefits when they move to another job rather than roll it over to an IRA or keep it in the 401(k) plan.[158] In other words, the money

155. Matching contribution percentages vary across employers. *See* Amazon.com Servs., Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) (Oct. 6, 2022) (showing that Amazon matches 50% up to 4% of compensation that an employee defers).

156. If the employee is seasonal, they must return three consecutive years and log their 500 hours of service.

157. *See generally Employee Tenure in 2020*, BUREAU OF LAB. STAT. (Sept. 22, 2020); https://www.bls.gov/news.release/archives/tenure_09222020.htm [https://perma.cc/UJZ5-AW5A]; VANGUARD, *supra* note 45, at 47.

158. Those opposed to immediate vesting argue that the money that lower-paid people are missing out on is insignificant. This is faulty reasoning. How can

will be consumed now rather than invested with the goal of increasing retirement savings.[159] Education and assistance with setting up a landing place for the 401(k) money could be helpful here. Or a change in mindset is required. Regardless, employees deserve the "free money" from their employers, and it should not matter that the employees need or use it now or later in life.

V. RECOMMENDATIONS

In order to judge whether ERISA's objective to increase the number of participants who receive retirement benefits is met, we need to focus not just on plan participation but on actual vested balances.[160] Employee contributions always vest immediately; however, low-paid individuals often miss out on crucial employer contributions that are subject to vesting schedules because they tend to be in higher-turnover businesses and do not stay long enough to vest.

Systemic practices, such as redlining and credit discrimination, have created wealth gaps between Black families and white families throughout the years.[161] Black people have not invested in the stock market as much as whites, which contributes to this gap. But when they do, it is through their employers' retirement plans.[162] This gap could be closing even if at a slow

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one say that any amount of money that is rightfully theirs be classified as insignificant? Companies get a tax deduction for contributing this money. It is "compensation." It is unconscionable to allow one worker's money to go to someone else just because of a vesting schedule, especially in high turnover businesses.

159. Borzi, *supra* note 12, at 34.

160. Jefferson, *supra* note 153, at 474.

161. Emily Badger, *Redlining: Still a Thing*, WASH. POST (May 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/05/28/evidence-that-banks-still-deny-black-borrowers-just-as-they-did-50-years-ago [https://perma.cc/N76Q-8RL2].

162. *Wealth Patterns Among the Top 5% of African-Americans*, CREDIT SUISSE (Nov. 2014) https://research-doc.credit-suisse.com/docView?sourceid=em&document_id=x603305&serialid=EPbpZVC9yQSzQAcQybZ8trdJT5i1wtDSIYihG%2b07VaQ%3d [https://perma.cc/QN3F-HGU4]; *see generally* Leo E. Strine, Jr., Conference Kickoff Remarks - Toward Racial Equality: The Most Important Things the Business Community Can Do (Oct. 29, 2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3232&context=faculty_scholarship [https://perma.cc/MBN4-UUXR].

pace. But if individuals' retirement accounts do not have employer contributions because those contributions were unvested and forfeited due to a change in job, they are starting with less money to build wealth.

I believe my recommendations will lead us toward decreasing retirement wealth inequality. First, we need to collect data so we can truly assess the monster we are dealing with. Currently, we only have enough data to postulate the impact on certain groups. I then argue that we need to prohibit megacompanies from using vesting schedules either via a full ban or through monitoring turnover levels and mandating immediate vesting when those thresholds are crossed. Lastly, I outline other testing mechanisms for those who remain unconvinced that immediate vesting is appropriate.

A. Increase Demographic Data Collection

To ensure that we stop qualified 401(k) plans from perpetrating barriers to retirement wealth accumulation, we must expand our data collection.[163] We need to collect data that truly captures the "actual retirement savings as measured by the vested account balances rather than on amounts made available by the employer for retirement savings."[164] Without better data collection we cannot know with certainty the level of negative impact that a vesting schedule inflicts on workers who churn through high-turnover employers. Additionally, once reforms are made, this data will measure equity outcomes and results from implementing such reforms.

To completely illuminate what we are dealing with, we need to know how much money high-turnover workers are forfeiting by not vesting. We also need to identify these workers based on gender, race, ethnicity, and wage.[165] Additionally, it would be helpful to know job tenure.

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163. *See generally* BROWN, *supra* note 128, at 160 (arguing that employer-provided plans should be required to "publish information on all aspects of retirement accounts by race and ethnicity" in exchange for tax subsidies); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 66, at 46 ("An evaluation of the effects of current vesting policies on participants' retirement savings may help to identify if those policies remain appropriate for a mobile workforce increasingly dependent on their employer-based retirement accounts . . . .")

164. Jefferson, *supra* note 153, at 471.

165. Some states already require employers to report such data albeit for a different ultimate goal. In California, employers of one-hundred or more

Currently, 401(k) plan-relevant data comes from a variety of places: Form 5500s; plan-administrator reports; research-institute plan surveys; household surveys; and with respect to turnover, Bureau of Labor and Statistics reports. None of these paint a complete picture of the impact of vesting schedules in high-turnover businesses even if you combine them in some way. The Form 5500 provides helpful information for each company's plan. However, it has been pointed out that there are issues with using the data to determine the true number of participants,[166] which will impact the number reflected on line 6h, those who "terminated prior to vesting."

Plan administrators, such as Vanguard, T. Rowe Price, and Fidelity compile data and present informative reports, but these reports are limited to plans that they administer. This does not give us a complete picture of all plans even if you try to combine them. Research institutes and organizations conduct informative surveys with companies, but responses are voluntary, and they do not divulge who responded to the survey.[167] As a result, we cannot determine whether the numbers align with high-turnover businesses and how the workers are impacted. Governmental agencies conduct household surveys (U.S. Census Bureau's Survey of Income and Program Participation and the Bureau of Labor Statistics' Current Population Survey), which are also limited, and financial illiteracy could provide erroneous results depending on the questions asked.[168]

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employees must submit annual pay and demographic information reports to the Department of Fair Employment and Housing. But there is a bill as of this writing that would expand this data collection to be more detailed. *See* Ryan P. Snyder, *California Proposes Bill to Expand Employer Pay Transparency and Pay Data Reporting*, CAL. LAB. & EMPL. L. BLOG, https://www.callaborlaw.com/entry/california-proposes-bill-to-expand-employer-pay-transparency-and-pay-data-reporting [https://perma.cc/WYR4-VG8G].

166. *See* Geoffrey Sanzenbacher, *Estimating Pension Coverage Using Different Data Sets*, CTR. FOR RET. RSCH. AT B.C. 1-2 (Aug. 2006), https://crr.bc.edu/wp-content/uploads/2006/08/ib_51-508.pdf [https://perma.cc/TA78-R4N4]; Jefferson, *supra* note 153, at 470-71.

167. For example, Plan Sponsor Council of America conducts an annual survey entitled, PSCA's Annual Survey of Profit Sharing and 401(k) Plans, which data has been discussed *supra* Part III. While the information is helpful, it is not all-inclusive. The PSCA will not divulge which companies responded to their survey, and it does not provide data that is necessary to meet the goals mentioned herein.

168. *See* Sanzenbacher, *supra* note 166, at 2 ("Since the [SIPP] questions are asked of individuals, responses can be inaccurate, which some studies have shown

When it comes to retirement plan wealth inequality, several organizations provide helpful information, e.g., the Center for Taxpayer Rights, the Pension Policy Center, Center for Retirement Research at Boston College, The New School Schwartz Center for Economic Policy Analysis, and Wharton Pension Research Council.[169]Although such organizations provide helpful information, I do believe that if my ask here was granted, these researchers would have more complete data to work from.

Lastly, I recently spoke to someone at the U.S. Department of Labor. My goal was to request more specific information or at least Form 5500 data that would show me the companies with the largest number of "participants that terminated without being vested." The agent said that there is no current way to compile that information.[170]

I assert that the best way to gather the necessary information is to amend the Form 5500 to require more detailed data. Amending the Form 5500 should not be out of reach. Government officials have been called upon to gather data that will provide a clearer picture of disparities. In a January 2021 Executive Order entitled "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," President Biden directed federal agencies to "identif[y] inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for addressing any deficiencies identified."[171] The President noted that "Many federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran

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lead to underestimation of participation in defined contribution plans if not corrected in some way." (citing John Turner, Leslie Muller & Satyendra K. Verma, *Defining Participation in Defined Contribution Pension Plans*, 126 MONTHLY LAB. REV. 36-43 (2003))).

169. *See, e.g.*, Teresa Ghilarducci, Siavash Radpour & Anthony Webb, *Retirement Plan Wealth Inequality: Measurement and Trends* (Schwartz Ctr. for Econ. Pol'y Analysis, Working Paper, 2019), https://www.economicpolicyresearch.org/images/docs/research/retirement_security/Retirement-inequality-working-paper-march-2019.pdf [https://perma.cc/JH3X-MJGD].

170. It is possible that a Freedom of Information Act request would yield data that could be compiled and reviewed, but I believe we need more complete information than what can be found via the Form 5500s.

171. Exec. Order No. 13985, 86 Fed. Reg. 7009-13 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government [https://perma.cc/9GFT-XFGR].

status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in government action is to gather the data necessary to inform that effort."[172]

As noted above, the Form 5500 requires certain information regarding those participating in plans, but it is incomplete in numerous ways, including its lack of demographic data for employees.[173] At this writing, the Form 5500 asks how many participants terminated without being fully vested.[174] But we need more detail. The form should clarify how many participants terminated with various levels of vesting, their pay, and ideally how much of their balances were cashed out and forfeited.

Collecting data that only shows how many participants terminated with less than 100% vested benefits can lead to erroneous assumptions. If the plan uses a three-year cliff vesting schedule, one could believe that this number reflects all employees who terminated employment during the plan year prior to meeting the three years of service requirement. But that is not the case—the number could be much higher. Employees who terminate prior to actively participating will be missing in this data.[175] The plan would have to have immediate auto-enrollment in order to make this assertion closer to being accurate. But if the plan has a graded vesting schedule, the Form 5500 does not capture the percentage vesting each terminated employee left with. For instance, I recommend the Form include a section for plans that use graded schedules to complete that would earmark how many terminated with 0% vesting, how many with 20% vesting, and so on. Capturing more data in this regard would be very helpful in assessing the impact on individuals who work for high-turnover companies.

The above requested data then needs to be disaggregated by "race, ethnicity, gender, disability, income, veteran status, or other key demographic variables" as President Biden has tasked agencies with.[176] Looking at the 401(k) vesting and forfeiture provisions through this new

172. *Id.* at 7011.

173. I am not the first to point out that the data and metrics are off when it comes to the Form 5500. Professor Jefferson has also pointed this out as it pertains to "active participation." Jefferson, *supra* note 153, at 470-71; *see also* Sanzenbacher, *supra* note 166, at 1 ("The 5500 data set does not allow breakdowns of the employee population by demographic characteristics . . . .").

174. *See* Form 5500 l. 6h.

175. Jefferson, *supra* note 153, at 471.

176. Exec. Order No. 13985, 86 Fed. Reg. 7011.

lens will better position policymakers to change these provisions to increase retirement security and close the retirement wealth gap that exists. The Department of Treasury has already started "examining the tax system through a racial equity lens."[177] Thus far I am unaware of an initiative to scrutinize the 401(k) minimum vesting schedules and their socioeconomic impact. Data relative to the pay and position the terminated employee held would be relevant.[178] The Equal Employment Opportunity Commission (EEOC) already requires businesses with one-hundred or more employees to report employment data on Form EEO-1.[179] This report requires data on demographics of the workforce, including data by race, ethnicity, and sex

177. *See* Wally Adeyemo & Lily Batchelder, *Advancing Equity Analysis in Tax Policy*, U.S. DEP'T OF THE TREASURY (Dec. 14, 2021), https://home.treasury.gov/news/featured-stories/advancing-equity-analysis-in-tax-policy [https://perma.cc/77X4-RUL8] ("Ensuring tax policy advances opportunity is crucial to creating a fair and prosperous economy. Secretary Yellen and the entire Treasury Department are firmly committed to an equitable federal tax system . . . ."). On March 3, 2022, the Treasury Department issued an interim final rule to "institute the reporting requirements related to demographics of those who own or control small businesses that receive a loan, investment, other credit or equity support, or technical assistance under the State Small Business Credit Initiative under the American Rescue Plan Act of 2021." State Small Business Credit Initiative; Demographics-Related Reporting Requirements, Interim Final Rule, 31 C.F.R. pt. 35, https://home.treasury.gov/system/files/136/SSBCI-Demographics-Related-Reporting-Requirements-IFR.pdf [https://perma.cc/5ZPT-78QP]. This rule was designed to advance equity. *Id.*

178. Right now we can only rely on survey or plan administrator data, which is incomplete. Surveys are voluntary and not all plans are represented. Plan administrator data is incomplete because the plan administrator can only compile data for the plans it administers.

179. Form EEO-1 Component 1 Report is required under section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, *see* 42 U.S.C. § 2000e-8(c), and 29 C.F.R. 1602.7-.14 and 41 C.F.R. 60-1.7(a). Numerous businesses are disclosing their EEO-1 information and workforce data on their company websites, see, e.g., Amazon Staff, *supra* note 10; *Our People,* LOWE'S, https://corporate.lowes.com/our-responsibilities/our-people [https://perma.cc/3WTY-TAV5], while others are affirming they will start doing so (sometimes thanks to shareholder proposal requests to do so), see, e.g., *Proxy Statement and Notice of 2021 Annual Meeting of Shareholders*, HOME DEPOT, https://ir.homedepot.com/~/media/Files/H/HomeDepot-IR/2021_Proxy_Updates/HD%20-%202021%20Proxy%20Statement.pdf [https://perma.cc/9DWJ-A4LV].

organized by job categories.[180] However, the EEO-1 used to also require detailed information on pay and work hours based on sex, race, ethnicity, and occupation.[181] It no longer collects this data. But even if it did, it would not give us a complete picture of vesting schedules' impact on terminated employees. We need more direct data disclosure to assess the impact on people in different groups for example: low-income, women, Black people, and Latinx people.

To reduce administrative burden on the reporting employer or plan trustee, the same EEOC job categories could be used for the suggested Form 5500 data. Additionally, the information could be helpful for EEOC to better understand employee turnover and be better positioned to see any pay disparities among the groups.

Employers who offer immediate vesting would be free of the administrative burden of reporting the extra data that I am suggesting. There would be no need for termination data as pertaining to vesting schedules if there is nobody losing out on their benefits. Perhaps such a carrot would encourage more employers to offer immediate vesting of their employer contributions.

B. Eliminate Vesting Schedules

Experts and commentators, including former President Jimmy Carter, have pointed out the need to ban vesting schedules and require immediate vesting.[182] Support for this is well stated by Halperin and Munnell:

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180. Form EEO-1 Component 1 Report.

181. Agency Information Collection Activities: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45,479, 45,483, 45,491 (July 14, 2016); *see* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 322 (2021). The Trump Administration stayed the regulation requiring the additional information, and in 2019, EEOC revealed that it would not continue to collect that more detailed data. Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,138 (Sept. 12, 2019).

182. *See* Halperin & Munnell, *supra* note 16, at 165; Norman Stein, Professor, Drexel Univ. Sch. of L., Statement Before the ERISA Advisory Council Working Group on "Gaps in Retirement Savings Based on Race, Ethnicity and Gender" 10 (June 24, 2021), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-gaps-in-retirement-savings-based-on-race-ethnicity-and-gender-stein-written-statement-06-24.pdf [https://perma.cc/ZR2F-MCFM]; Drew Von Bergen, *A Presidential*

> The difficulty with a lengthy vesting period is that participants have no sensible way to respond to the risk of forfeiture. On one side, if people assume that vesting will happen, they will end up saving too little when it does not; on the other side, if people assume they will not become vested, they then end up having saved too much when they do. *Earlier vesting would allow individuals to plan their saving better and ensure more benefits to workers already covered by a plan*.[183]

In addition, immediately vesting employer contributions will improve retirement security.[184] When employees take a job that offers 401(k) benefits, the expectation is that they will be receiving those benefits. "[W]orkers need to be protected from accepting retirement benefits that turn out to be illusory, fraudulent, or excessively vulnerable to employer abuse; retirement benefits that remain forfeitable for some excessively long period are unreasonably dangerous to the financial health of employees, and should be outlawed."[185] I agree with Professor van Zante, with a slight modification. There should be no period of forfeitability, excessively long or not.[186] Albert Feuer, a New York employee-benefits attorney, originally proposed two-year cliff vesting (outside of the context of high turnover) as the next step in the evolution of vesting schedules. However, after considering my research herein, he stated that a two-year cliff "would still leave the majority of new employees being unable to keep any employer

Commission Thursday Recommended Enrolling All American Workers . . . , UPI (Feb. 26, 1981), https://www.upi.com/Archives/1981/02/26/A-presidential-commission-Thursday-recommended-enrolling-all-American-workers/7281352011600 [https://perma.cc/C7UW-UFCD] ("The commission proposed immediate vesting of benefits—a guarantee that a worker will receive some retirement income—that would be carried from job to job."); Osgood, *supra* note 113, at 474 ("Full vesting represents the logical culmination of the notion that qualified plan participation is a property right and not a bounty."). *But see* van Zante, *supra* note 61, at 154 (arguing that mandating any vesting suppresses the voluntary retirement plan system).

183. Halperin & Munnell, *supra* note 72, at 165 (emphasis added).

184. *See* van Zante, *supra* note 61, at 219.

185. *Id.*

186. If we mandate immediate vesting, we protect workers and do not have to define Professor van Zante's term "excessively long period."

matches."[187] Perhaps a one-year cliff is the compromise if Congress will not ban vesting altogether.

Full immediate vesting will help those who work in high-turnover businesses that offer plans. Conceivably, immediate vesting could further exacerbate the gap between those who work for employers with plans and those who do not, but if we are fixing existing 401(k) plans, then we need to at least focus on those workers that are negatively impacted by the vesting schedules in place—the lower-paid. Governmental encouragement to immediately vest exists—if a plan auto-enrolls participants with a qualified automatic contribution arrangement (QACA) and the plan vests employer contributions 100% immediately, the plan will come within safe harbors for nondiscrimination testing under the ADP and ACP tests. This is a boon for both companies and workers. Compliance with the ADP and ACP tests is burdensome. A further benefit of immediate vesting is being free from the grips of a potential partial plan termination.

High-turnover megacompanies literally bank on the financial benefit of using a vesting schedule by using forfeitures that reduce compensation costs. The more turnover, the higher the forfeitures. Since forfeitures can be used to the company's advantage—either to reduce administrative expenses or to cover employer contributions—businesses with high turnover specifically benefit financially by reducing compensation costs. If the forfeiture money is in the trust, then that is less that the employer has to put in to cover plan expenses and contributions for other employees. This happens all in the name of a "benefit" to employees but in actuality benefits companies that use vesting schedules. We have no proof of whether these compensation cost savings translate into higher pay or other benefits for workers.[188] But we *can* see that there is a direct compensation cost savings. Additionally, it could be that workers who are higher-paid and stay longer are benefiting most from these forfeitures. Also, bear in mind that these

187. Albert Feuer, *Would the Securing a Strong Retirement Act Secure More Retirement Equity?*, 50 TAX MGMT. COMP. PLAN. J. 25 (2022).

188. Contrarily, it is more likely that these companies have a budget for their retirement plan or overall compensation costs, and these cost savings will be viewed as part of the larger compensation picture. The added costs of immediate vesting will have to come from somewhere. Professor van Zante argues that retirement plans will reduce their benefit levels (presumably he means the matching percentages or other employer contributions) in order to cover the additional costs resultant from the loss of forfeitures. van Zante, *supra* note 61, at 132. However, if this happens, the company will become less competitive both with respect to recruiting new workers and for retaining their own.

plans likely have $1,000 cash-out provisions which means that for any employee who leaves with $1,000 or less in their nonforfeitable account, the company can cash them out.[189] When the company cashes them out, the forfeitures happen in that same plan year instead of waiting for a five-year break in service. And the company saves administrative fees by closing those accounts.

My recommendation would first be to eliminate the use of vesting schedules, period. Given the prevalence of retirement insecurity across lower socioeconomic workers in this country, retirement plans are not the place to insert precarity.

While it is true that nearly half of the companies in the United States already voluntarily offer immediate vesting, there are many megacompanies that do not. The goal is not to achieve a percentage of plans that vest employees; the goal is to vest the most people's accounts. Amazon's plan counts in the statistics as one plan that has three-year cliff vesting. Yet, Amazon is the second-largest employer in the country.[190] If we want to close some gaps, we need to pay attention to the *number* of affected individuals. As stated *supra* Section III.B, Amazon had 236,751 participants that terminated without any vested benefits in 2021.

Concern over the number of participants that vest rather than a focus on the number of plans that have or have no vesting schedule leads to a recommendation that megacompanies should be required to immediately vest their employer contributions. Doing so would provide vested benefits to a large number of workers and eliminate the windfall that these large businesses are getting. This solution would further ERISA's purpose.[191]

Which businesses qualify? Ideally, businesses that are not considered small businesses should be required to immediately vest. Congress can determine which businesses are included or excluded from the mandate.

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189. Notably, when a company cashes out a former employee with a balance of $1,000 or less, that employee has to pay income tax and a 10% penalty on the distribution unless it is rolled over into an IRA within sixty days. If the former employee has a balance between $1,000 and $5,000, then they cannot be cashed out without giving permission. Participants can elect to keep the money in the plan. If they do so, the employee could continue to defer taxation until they withdraw the money in retirement. There are typically lower fees for keeping the money in a company's 401(k) plan than in an IRA.

190. *See generally* Romano, *supra* note 97 (highlighting the growth in the number of Amazon employees).

191. Further, as Professor van Zante has said "any period of forfeitability creates a significant danger to employees, and that no material social advantages are offered by forfeitable retirement benefits." van Zante, *supra* note61 at 219.

However, applicability should be discerned by looking at the number of affected employees. In particular, megacompanies should be required to immediately vest. Megacompanies are purportedly using vesting schedules to incentivize people to stay, yet there is still high turnover. This would seem to indicate that vesting is not accomplishing what they want it to accomplish.

As Senators Rubio and Brown said in their letter to Secretary Walsh, "Amazon can afford to treat its workers well, and should be held accountable to do so."[192] While this comment was grounded in the idea of employment laws, I would extend the implication of the comment to the retirement benefits that employees should be getting. Amazon and Home Depot both employ and churn an extraordinarily large number of Americans.[193]

Continuing to allow Amazon and other large high-turnover employers to use a vesting schedule exacerbates the retirement savings wealth gap by foreclosing employees from receiving the employer contributions put into the plan originally on their behalf. This is an area in which I am hoping the government will require disclosure data on, but for now one can reasonably conclude that the employees at Amazon who are deliberately churned are those warehouse ("field and customer support") workers. Amazon's domestic warehouse workforce is comprised mostly of people of color.[194] And from their 2021 EEO-1 form, we know 761,568 employees were in the category of "laborers & helpers," which we can reasonably assume are the lower paid hourly workers in the warehouses.[195] That is no small number.

Additionally, requiring immediate vesting will make it easier for all workers, including those with varying financial literacy, to receive and understand their benefits. Without vesting schedules, participant statements are much easier to understand. What is presented is what a

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192. Letter from Sens. Rubio and Brown, *supra* note 3.

193. *See* Dominick Reuter, *1 Out of Every 153 American Workers is an Amazon Employee*, INSIDER (July 30, 2021, 12:26 PM), https://www.businessinsider.com/amazon-employees-number-1-of-153-us-workers-head-count-2021-7 [https://perma.cc/9JST-4L62].

194. Amazon Staff, *Our Workforce Data*, AMAZON, https://www.aboutamazon.com/news/workplace/our-workforce-data [https://perma.cc/E66C-F6ZS].

195. *2021 Employer Information Report EEO-1*, AMAZON, https://assets.aboutamazon.com/ff/dc/30bf8e3d41c7b250651f337a29c7/2021-amazon-consolidated-eeo-1-report-2p.pdf [https://perma.cc/38BH-XWKV].

participant is entitled to; there are no separate columns for vested vs. non-vested amounts.

There appears to be bipartisan support in Congress for retirement and pension reform.[196] It is imperative that these vesting issues are scrutinized with retirement plan policy in mind. Legislation that requires businesses of a certain size to immediately vest all of their contributions will increase the size of retirement account balances.[197]

In 2021, it was said that approximately one out of every 153 U.S. workers is an Amazon employee.[198] Fallout from Amazon's deliberate employee churn will continue to be significant. If the 236,751 people who left in 2021 prior to being vested all had balances that were forfeited, that would be a very large number. Those individuals would be impacted not only by a lack of ability to have the money in their accounts but also because they do not have that money to invest.[199]

Some pushback to the immediate vesting recommendation lies in the voluntary nature of retirement plans. Offering 401(k) plans is voluntary; employers are not required to offer them by law. So, when retirement reform is sought, companies threaten to eliminate their plans.[200] This is likely an empty threat as employers need to offer a retirement plan to be competitive—it is expected.[201] In a survey done by Betterment for Business,

196. *See* Pratt, *supra* note 136, at 377 ("Despite the frequent—and sometimes bitter—disagreements that seem to permeate lawmaking on Capitol Hill, there is widespread bipartisan support for pension reform.").

197. *But see* van Zante, *supra* note 61 at 157.

198. Reuter, *supra* note 193.

199. Money in 401(k) plans can also be borrowed or withdrawn early for hardship purposes (with penalties). Having this additional savings that someone can tap into for emergency purposes is important. Leakage arguments aside, 401(k) loans are a good option for those who have poor credit since no credit check is required to borrow one's account balance.

200. SCHULTZ, *supra* note 16, at 215.

201. *See* Jessa Claeys, *Companies Without a 401k Miss Out on Top Talent*, 401(K) SPECIALIST (Aug. 29, 2018) https://401kspecialistmag.com/companys-without-a-401k-miss-out-on-top-talent [https://perma.cc/N4C2-JHWG]; *47% of Workers Say Retirement Benefits Were an Important Reason They Joined Their Current Company,* STAFFING INDUS. ANALYSTS (Apr. 25, 2002), https://www2.staffingindustry.com/Editorial/Daily-News/47-of-workers-say-retirement-benefits-were-an-important-reason-they-joined-their-current-company-61411 [https://perma.cc/B3U2-3V7E]. Companies may

"91 percent of workers agree that a company's 401k plan (or lack thereof) had at least some impact on their decision to take a job."[202] To the extent that employers wish to provide competitive benefits to bring in talent, a retirement plan is becoming increasingly more effective. Eliminating plans at this point could have a deleterious effect on hiring. But maybe that depends on who a company is seeking to recruit. "With some employers that have a lot of hourly or part-time workers, [vesting] never comes up."[203]

The voluntary nature of plans also presents itself in flexibility of permissible plan provisions. It has been argued that putting more regulation on retirement plans—including vesting—minimizes an employer's ability to create a plan that is best for the company and its employees.[204] Do we really need a vesting schedule to be one of the choices an employer can make? There are plenty of other choices such as how much and what type of employer contributions to make or whether to offer participant loans.

An historic argument against using immediate vesting lies in concerns about an increase in administrative burden and costs associated with administering a plan with more participants.[205] Many plan administration companies charge based on the number of participant accounts. But now that computers can handle more data more quickly, and participant statements can be emailed rather than mailed, the administrative burden should not be as onerous as before. And the fee argument really does not

amend plans to reduce company contributions, but they do so while risking push back by employees. One Trader Joe's employee stated, "I was planning on being here my whole career, I was so happy. But they just keep chipping away at things." Dave Jamieson, *Trader Joe's Cut Worker's Retirement Benefits During the Pandemic*, HUFFPOST (May 27, 2022, 5:45 AM EDT) https://www.huffpost.com/entry/trader-joes-cuts-retirement-benefits-union_n_628fb71ce4b0415d4d828679?3 [https://perma.cc/N54S-TLPS].

202. Claeys, *supra* note 201.

203. Ward, *supra* note 65 (quotations omitted).

204. van Zante, *supra* note 6161 at 219.

205. This argument has been made since the 1970s and is one that is continuously repeated. *See* H.R. REP. NO. 93-779, at 23 (1974); Osgood, *supra* note 113, at 475-76 ("The idea of 'cost' should not be viewed solely from the employer's perspective. [T]he cost argument does not adequately confront the . . . perceptions of the nature of qualified plan participation and the specific goals Congress has articulated in recent legislation regulating employee benefits plans.").

hold water because many fees are passed along to the participants.[206] If fees are inflated and still considered an issue, [207] perhaps this is an issue for plan administrators and/or Congress to deal with, not at the expense of plan participants.

To the point of plan administration fees based on the number of participant accounts, immediate vesting eliminates the need to pay for dormant account balances while waiting to forfeit an ex-employee's balance.[208] This is an area ripe for errors as noted by the IRS.[209] Immediate vesting also eliminates the need to worry about complying with the partial plan termination rules which are murky and difficult to apply.

Immediate vesting could cause a company to incur additional costs since there are no forfeitures to cover administrative fees or reduce future contributions. A company may have to inject more money into the plan due to the loss of forfeitures.[210] Some companies are willing to absorb the costs of losing out on forfeitures, e.g., Walmart and Lowes, and still retain a competitive contribution rate. However, other companies may not be so willing, particularly companies that need to keep their compensation costs constant. Critics of immediate vesting contend that companies will reduce their matching percentages and other employer contributions in order to

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206. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 66, at 23*; see also* BIRDTHISTLE, *supra* note 21, at 151 ("401(k) plans often come with administrative fees assessed on the accounts of their participants, which will come as a surprise to the 70 percent of plan participants who think their 401(k) is free.").

207. In 2008, Professor Pratt observed that both Department of Labor and Congress were concerned with the "level of fees charged to plan participants" and that "there is substantial evidence that neither plan sponsors no[r] participants understand [the fees]." Pratt, *supra* note 26, at 1138; *see also* Ron Lieber, *Revealing Hidden Costs of Your 401(k)*, N.Y. TIMES (June 10, 2011) https://www.nytimes.com/2011/06/11/your-money/401ks-and-similar-plans/11money.html [https://perma.cc/8DSG-N849] (describing efforts by the Labor Department to increase transparency in 401(k) fees).

208. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 72, at 23.

209*. See, e.g.*, *401(k) Plan Fix-It Guide – Eligible Employees Weren't Given the Opportunity to Make an Elective Deferral Election (Excluding Eligible Employees)*, I.R.S. https://www.irs.gov/retirement-plans/401k-plan-fix-it-guide-eligible-employees-were-not-given-the-opportunity-to-make-an-elective-deferral-election-excluding-eligible-employees [https://perma.cc/6563-55CA].

210. Let us not forget that this money will be an ordinary and necessary business expense and therefore deductible.

keep compensation costs static.[211] Such reduction is a possibility. Even if employers do reduce benefits, and I am not convinced they will because they need to remain competitive, at least individuals can accurately plan for retirement instead of experiencing uncertainty about a potential termination or departure from their job. And employees will appropriately accrue their rightful employer contributions based on their own years of service instead of forfeiting the benefit to the company and longer-tenured employees.[212]

Reducing retirement benefits like the company match could impede a company's ability to attract talent. "Millennials are [] willing to leave a job for another simply because it offers a better 401k plan solution."[213] But it is not a foregone conclusion that a reduction of benefits will impact the company's ability to hire. Some workers only look to see if a company *has* a 401(k) plan, not necessarily what the employer's matching percentage and vesting schedule are.[214] Some workers do consider the quality of the plan before accepting a job offer or applying.[215] This is rolling the dice a bit for

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211. *See* van Zante *supra* note 61, at 165 ("After the initial shock of newly mandated accelerated vesting, an employer must consider whether to continue to pay an increased level of contributions, or to adjust the compensation packages of the short-tenure employees, or to adjust the level of retirement benefits to eliminate the incremental mandated benefits.").

212. *But see* van Zante, *supra* note 61, at 170.

213. Amanda Roesser, *Do Millennial Employees (Really) Love Your 401k Plan?*, 401K SPECIALIST (Feb. 14, 2019), https://401kspecialistmag.com/do-millennial-employees-love-your-401k-plan [https://perma.cc/K2B7-8TLT].

214. *See Multi-Country Survey Finds Most Workers Cite Pension and Retirement Benefits as Critical Factor when Deciding to Accept or Stay in a Job*, BUS. WIRE (July 11, 2019, 6:59 AM EDT), https://www.businesswire.com/news/home/20190711005002/en/Multi-Country-Survey-Finds-Workers-Cite-Pension-Retirement [https://perma.cc/7UWT-EU7R] (finding that "pensions and retirement benefits are a critical factor for most workers," yet they generally have a "strong appetite[] for retirement information and support"). Accenture conducted an online survey of 5,000 workers with pension plans across 10 countries in September and October 2018; there were 500 respondents from each country. Of those respondents, 68% of workers with pension or retirement plans found those benefits to be a critical factor when deciding whether or not to accept a job, and 62% reported that it was a critical factor to stay with a job. *Id.*

215. *See The Impact of the Great Resignation on Benefit Needs and Expectations: An Employee Survey from Betterment's 401(k) Business*, BETTERMENT 1 (2021),

the big companies that must compete for various levels of workers, especially for a company like Amazon, which is predicted to run out of people to hire in the next few years in certain cities.[216] Take a worker who wants to work at a home improvement retail business. The worker may not be financially literate enough to know that one needs to not only know a 401(k) plan is offered, but also that the matching and vesting schedule are significant considerations. If the jobseeker considers only the mere existence of a 401(k) plan as a benefit and not the rest, they could choose to work at Home Depot over Lowes, not realizing that Home Depot's 401(k) has a vesting schedule.[217] They may also choose Amazon instead of Walmart. At Walmart or Lowes, the worker will be immediately vested in matching contributions, whereas at Amazon or Home Depot, their matching contributions are subject to a three-year cliff schedule. Expecting

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https://resources.betterment.com/hubfs/PDFs/b4b/reports/financial-wellness-benefits-survey.pdf [https://perma.cc/DYJ7-PHKD]. In September 2021, Betterment's 401(k) business surveyed 1,000 full-time employees to assess their understanding of financial benefits and to see what they are looking for from their employers. According to the survey, 74% of employees would be likely to leave their job for an employer that offers better financial benefits, where 65% could be enticed to leave their jobs for a high-quality 401(k) or other retirement plan and 56% for a 401(k) matching program*; see also 2021 Defined Contribution Plan Participant Survey Findings: More Participants Need Help with Retirement Planning*, J.P. MORGAN ASSET MGMT. 1, 11 (2021), https://am.jpmorgan.com/content/dam/jpm-am-aem/global/en/insights/retirement-insights/RI-PPSF-21.pdf [https://perma.cc/U8BH-ER7E] (finding that employees want, and generally expect, their employers to help them save for retirement). In January 2021, J.P. Morgan partnered with Greenwald Research to conduct an online survey of 1,281 employees who participate in contribution plans. Of those participants, almost 90% identified retirement benefits as being an important factor when choosing whether to stay with their current employer or pursue a new employment opportunity, and 75% believe employers are responsible for helping them save for retirement. *Id.*

216. Jason Del Rey, *Leaked Amazon Memo Warns the Company is Running out of People to Hire: Unions Might Not Be the Tech Giant's Biggest Labor Threat*, VOX (June 17, 2022, 7:00 AM EDT) https://www.vox.com/recode/23170900/leaked-amazon-memo-warehouses-hiring-shortage [https://perma.cc/A94W-8TG2].

217. Recall that Home Depot uses a three-year cliff schedule for matching; Lowes uses immediate vesting for matching. I am not advocating for work at one business over another except as to the 401(k) plan benefits. Certainly, other factors impact decisions of where to work.

individuals with inadequate financial literacy who do not know of 401(k) nuances and the differences to be able to choose an employer based on the best retirement benefits is ridiculous. If immediate vesting is required, that removes more complexity. The answer is to simplify this for people. Education is insufficient. Employers inform and educate in the hiring on-boarding process, and even if employees understand at that time, they are likely to forget later.

C. Mandate That High Turnover Triggers 100% Vesting

There are alternatives if we cannot gain support to require an immediate vesting schedule for large companies. We could require companies (exempting small businesses) that experience a certain level of turnover to immediately vest all plan participants. This can be achieved via a new rule or by amending the partial plan termination rules.

The partial plan termination rules require one-hundred percent vesting "when a 'significant number' or 'significant percentage' of employees are affected by an event such as a plant closing, sale of a business, or corporate reorganization."[218] All of the facts and circumstances are to be considered.[219] Currently, the IRS has placed its primary focus on a presumption that a partial termination occurs when the turnover rate is 20% or more.[220] But employing a percentage is not always the best way.

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218. Prince, *Employee Turnover & Partial Plan Terminations*, *supra* note 39, at 6-4; Jo Ann C. Petroziello & Samantha J. Prince, *Partial Termination of Single-Employer Tax Qualified Plans: Clarity or Misappropriated Judicial Decision-Making?,* 2 GEO. MASON INDEP. L. REV. 265, 273 (1994).

219. Treas. Reg. § 1.411(d)-2(b)(1) (2019).

220. *Issue Snapshot – Partial Termination of Plan*, I.R.S. (Nov. 18, 2021), https://www.irs.gov/retirement-plans/partial-termination-of-plan [https://perma.cc/RQ6S-2G2Y]. The 20% presumption is not impossible to overcome—all of the facts and circumstances are to be considered when considering whether a partial termination has occurred. If the factors are significant enough, then the IRS may find a partial termination has occurred even if the percentage is less than 20%. *See* Petroziello & Prince, *supra* note 218, at 283-84; *see also*, Rev. Rul. 2007-43, 2007-2 C.B. 45 (finding a presumption of a partial termination where the turnover rate for employees was 23%); Matz v. Household Int'l Tax Reduction Inv. Plan, 388 F.3d 570, 578 (7th Cir. 2004) (holding that "there is a band around 20 percent in which consideration of tax motives or consequences can be used to rebut the presumption created by [a 20 percent or greater reduction in plan

What if we redirect the focus to considering the facts and circumstances as stated in the Treasury Regulations, and actually utilize the "significant number" instead of that percentage?

The IRS could implement a definition of the term "significant number" to use when testing the plans of megacompanies.[221] Using the "significant percentage" test allows large companies to avoid partial plan terminations even when employee turnover is very high. Take Amazon for instance: 236,751 participants terminated without vesting in 2021. This number surely is a "significant number" of people. Granted, in computing this threshold, the IRS may feel constrained to look at what Amazon considers to be routine turnover and exclude that from the computation of significant number. But if a significant number is found to have terminated employment during the plan year, then the plan would be considered to have experienced a partial plan termination. This means that all participants who terminated during that year must be 100% vested.

Using the significant number test instead of the significant percentage test would be helpful, but also it would be important to pay close attention to the calculation of regular turnover which could be incredibly burdensome for large companies.[222] Regular turnover is excluded from the calculation of whether a significant number or percentage has been terminated. With regularly high-turnover companies, the calculation should be different—or alternatively, the measure of significance can account for the high turnover via the facts and circumstances test. These tests are already in the Treasury Regulations and just need to be viewed with a focus more toward megacompanies.

The partial termination rules are in place primarily for situations where a company takes an action that results in employees being terminated.

participants]"); Halliburton Co. v. Comm'r, 100 T.C. 216, 237 (1993) (declining "to accord talismanic significance to the 20-percent rule of thumb, but will regard the percentage drop in the light of the other facts and circumstances").

221. Currently the IRS uses a significant percentage test but likely would consider significant number for small businesses where it believes a look at the facts and circumstances warrant its use. *See* Rev. Rul. 72-510 (advancing the "significant number" test); Rev. Rul. 2007-43 (advancing the "significant percentage" test).

222. The burden is on the employer to support its "normal turnover rate." *In re* Gulf Pension Litig., 764 F. Supp. 1149, 1167 (S.D. Tex. 1991); Petroziello & Prince, *supra* note 218, at 288-89 (stating that the burden is properly placed on the employer since "the use of a 'turnover rate' is a defense to a claim that a partial termination has occurred"). For details on how to compute turnover rates, see Rev. Rul. 2007-43, 2007-2 C.B. 45.

"[O]nly involuntary, employer-initiated, terminations should be considered" in calculating whether a significant percentage or significant number of a workforce has been terminated.[223] However, a corporate event is not required. A partial termination is not triggered by regular turnover, which is why the computation removes it. Companies that have historically high turnover that occurs outside of an employer-initiated event and are under the 20% mark are in most cases safe from being considered partially terminating their plan due to the aforementioned presumption.[224] These rules do not consider "voluntary" terminations but rather were put into the Code to protect individuals who are laid off.

But when employees are incentivized to quit due to intolerable working conditions and other employer churn policies, as is the case with Amazon workers, they do not get the opportunity to vest and are not counted for purposes of the partial termination rules.[225] I recommend that either we expand the rule to include coverage for the churned employee, or we simply create another rule entirely—one that directly looks at forfeitures and turnover, see *infra*. My proposal is not farfetched:

> Even if an employee resigns, however, the termination may still be counted [for partial termination purposes] if *it is shown that the participant was constructively discharged, meaning that the employee resigned due to intolerable working conditions created by the employer*.[226]

The partial termination rules are a challenge to apply[227] but Congress could provide clarity. Intolerable working condition turnover could be included in the computation of whether a company has incurred a partial

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223. *In re* Gulf Pension Litig., 764 F. Supp. at 1166; Anderson v. Emergency Med. Assocs., 860 F.2d 987, 990 (10th Cir. 1988).

224. *See* EDWARD THOMAS VEAL & EDWARD R. MACKIEWICZ, PENSION PLAN TERMINATIONS 296 (1989).

225. *See generally* Halliburton Co., 100 T.C. at 227 ("While . . . one purpose of the [partial termination] rule is to prevent abuse, the rule has the additional purpose of protecting employee's legitimate expectations of benefits.").

226. *Id.* at 240 (emphasis added) (citing first *Kreis v. Charles O. Townley, M.D. & Assocs., P.C.*, 833 F.2d 74, 81–82 (6th Cir. 1987); and then *Young* v. *Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir.1975)).

227. *See* Petroziello & Prince, *supra* note 218, at 315 ("[T]he unclear partial termination rules impose much greater costs, not only to the employer, but ultimately to the plan participants, than would the mere vesting of participants to the extent funded.").

termination. If trying to put this square peg into a round hole would be too difficult, then a new law could be added to the IRC requiring that high turnover will result in immediate vesting for employees that left. The question would be how to compute turnover. Do we look at turnover of all employees as a group, or do we compare the turnover of low-paid employees to high-paid employees?[228] A version of the latter would illuminate which workers were most valued, and which are being taken advantage of by the vesting schedule.

It would be administratively burdensome to ascertain why a worker left. Additionally, workers could potentially leave intentionally in order to immediately vest if they were savvy enough to know. This would have to be thought out in more detail and perhaps the answer is indeed to work this into the existing partial termination rules. Certainly, there could be a small business exemption, and there could be an exemption or grace built in for disruptive occurrences, like a pandemic for instance.[229]

The IRS could adopt an alternative test to avoid trying to fit the scenario into the existing partial plan termination rules. Such a test could mimic existing anti-discrimination testing, but here focus on the forfeitures of the lower-paid employees that are most impacted. A test could compare non-highly compensated employee overall forfeitures to the same group's overall vested benefits for a given year and take into consideration the employee churn. The formula could take that comparison and include a ratio between Line 6h (participants terminated) and Line 6(a)(1) (total participants) from the Form 5500.[230] Once the number is computed, it could be assessed to see whether it breaches a certain threshold. If the threshold

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228. *See* Rev. Proc. 75-49, 1975-2 C.B. 584 (accounting for turnover of all employees).

229. The Taxpayer Certainty and Disaster Tax Relief Act of 2020, Section 209 provided relief for businesses due to the pandemic. For 2020 and 2021, the Act required that instead of counting the reduction in the number of participants, employers were to look at the percentage of active participants still in the plan. If the number of active participants covered on March 31, 2021 was at least 80% of the active participants on March 13, 2020, then there would be no partial plan termination. This allowed employers to count new hires who were enrolled in the plan prior to March 31, 2021. *Coronavirus-Related Relief for Retirement Plans and IRAs Questions and Answers*, I.R.S. (Aug. 19, 2022), https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers#partial-termination [https://perma.cc/6N5W-GLFX].

230. (non-HCE forfeitures / non-HCE vested benefits) + (Line 6h, participants terminated / Line 6a(1) or Line 5 overall participants)

is breached, then all would be vested. Such a test would create a sort of compound that addresses both forfeitures and excessive churn. This formula places greater weight onto those non-highly compensated employees most affected. It accounts for every dollar of forfeitures created and does not treat every participant one to one. As such, the formula results in a negative impact to the employer's score when more employees are churned. And adding the termination check helps to balance out any skewing that results from longer term managerial or higher paid employees.

Something needs to be done to address the direct tension with retirement plan policy when employers that know they have high turnover use a vesting schedule. If we have a rule that requires immediate vesting upon a certain level of regular turnover, then we encourage employers to improve working conditions for their workers. This would flip the narrative. Instead of a vesting schedule being a handcuff for workers to stay, workers will stay to vest if the employer has favorable and safe working conditions.

If the turnover continues, then the company can avoid any administrative challenges that are associated with this by simply amending the plan to immediately vest everyone. Either way, it is a win.

VI. CONCLUSION

Retirement wealth inequality and retirement security are issues that the United States has been grappling with for years. Low-paid and minority workers are directly impacted and suffer from these issues the most. This Article shows that big companies, particularly those with high turnover, are abusing legally permissible 401(k) plan vesting schedules to worsen retirement security and wealth inequality for marginalized groups.

This Article spotlighted Amazon, but there are other businesses who have high turnover that are also abusing vesting schedules to their benefit and to the detriment of their employees. Since these companies are allowed to re-use contributions they have made on an employee's behalf for other employees and to reduce their plan administrative fees, they enjoy a windfall through the reduction of compensation costs. This all comes at the expense of the employees and exacerbates retirement wealth inequality. "I'm trying to tell you now it's sabotage."[231]

If we leave the plan schema the way it is, including the permissible vesting schedules, we will continue to replicate the inequities. Retirement income equality will not be achieved if vesting schedules are permitted to still be used by megacompanies particularly those with high turnover. As

231. BEASTIE BOYS, *Sabotage*, *on* ILL COMMUNICATION (Grand Royal 1994).

such, megacompanies should be foreclosed from using vesting schedules in their retirement plans. They simply employ and turn over too many people. It is against public and retirement security policy to allow megacompanies to abuse the system by using vesting schedules in tandem with high turnover.

Without retirement wealth equity and security, upward mobility for marginalized groups cannot be achieved. The more urgent starting point is to assure all individuals who work for megacompanies and those who work in high-turnover businesses in fact get their retirement benefits. These benefits need to be immediately vested. It is time.

Appendix 1: A Sampling of Large Company Vesting Schedules

Company	Vesting Schedule	Number Of Terminated Employees Without 100% Vesting			
		2018	2019	2020	2021
Amazon.Com Services, Inc.	3-Year Cliff	26,864	34,181	92,861	236,751
Apple	Immediate vesting	---	---	---	---
Bed Bath & Beyond Inc.	5-Year Graded	407	494	558	220
Costco Wholesale, Inc.	5-Year Graded	10,494	10,600	9,461	15,828
Dick's Sporting Goods, Inc.	3-Year Graded	378	175	464	476
Meta	Immediate vesting	---	---	---	---
FedEx Corporation	401(k) = 1-Year Cliff Pension Plan = 3-Year Cliff In process of transitioning	10,555	13,181	9,997	18,389
Foot Locker, Inc.	2 -Year Cliff	572	542	215	402
Google, Inc.	Immediate vesting	---	---	---	---
The Home Depot, Inc.	3 -Year Cliff	77,487	93,880	68,638	129,766
**Honeywell International Inc.	3 -Year Cliff	408	1,012	1,079	1,524
**Johnson and Johnson	3 -Year Cliff	563	1,560	765	938
The Kroger Co.	3- Year Cliff	3,444	2,149	1,789	2,727
Lowes	Immediate vesting	---	---	---	---
Microsoft	Immediate vesting	---	---	---	---
Netflix	Immediate vesting	---	---	---	---

Company	Vesting Schedule	Number Of Terminated Employees Without 100% Vesting			
		2018	2019	2020	2021
**PepsiCo, Inc.	3 -Year Cliff	8,400	9,104	7,808	12,568
Walmart Inc.	Immediate vesting except profit sharing contributions which are six year graded	948	600	518	411

** Early 401(k) plan adopters.