



CYPEN & CYPEN NEWSLETTER for June 18, 2020

Copyright, 1996-2020, all rights reserved
Stephen H. Cypen, Esq., Founding Editor
Robert D. Klausner, Esq., Senior Editor

Never Forget September 11, 2001
and
Always Remember May 2, 2011

1. "NO CONTEST"; GORSUCH LEADS U.S. SUPREME COURT RULING THAT PROTECTS LGBT EMPLOYEES AGAINST FIRING:

The U.S. Supreme Court in a divided [decision](#) Monday, June 15, 2020, said federal workplace laws prohibit employers from firing gay, lesbian and transgender workers. The justices split 6-3, with Justice Neil Gorsuch writing the majority opinion. He was joined by Chief Justice John Roberts Jr., and the court's liberal wing. Justices Brett Kavanaugh and Samuel Alito Jr. wrote separate dissents. Justice Clarence Thomas joined Alito's dissent.

"Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male

employees,” Gorsuch wrote in his 43-page opinion. “But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”

At oral argument, Gorsuch was seen as possibly leaning toward a ruling for broad protections for LGBT workers based on the text of the law. But he also expressed concern about the possible social impact of providing Title VII coverage. Alito stated in his 54-page dissent: “There is only one word for what the court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.”

Alito noted that numerous bills have been introduced over the past 45 years that would specifically add “sexual orientation” and “gender identity” to protections under Title VII. “But to date, none has passed both Houses,” he wrote. Kavanaugh, in his separate dissent, wrote that the policy arguments for applying Title VII coverage were “weighty,” but, he added, “we are judges, not Members of Congress. Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.” That analysis applies as well to whether Title VII covers gender identity discrimination, he wrote.

The court’s decision came in three cases which focused closely on the text of Title VII of the Civil Rights Act of 1964, which bars discrimination by employers “because of ... sex.” Two cases-- *Bostock v. Clayton County, Georgia*, and *Altitude Express v. Zarda*--raised the question of sexual orientation under Title VII. *R.G. and G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission and Stephens* centered on gender identity.

During arguments in October in *Bostock* and *Zarda*, Stanford Law’s Pamela Karlan, representing gay and lesbian employees, told the justices: “When an employer fires a male employee for dating men but does not fire female employees who date men, he violates Title VII. The employer has, in the words of Section 703(a), discriminated against the man because he treats that man worse than women who want to do the same thing. And that discrimination is because of sex because the adverse employment action is based on the male employee’s failure to conform to a particular expectation about how men should behave.” But Alito noted that Congress has repeatedly declined to act on requests to address the sexual-orientation issue. “And if the court takes this up and interprets this 1964 statute to prohibit discrimination based on sexual orientation, we will be acting exactly like a legislature,” he said.

Karlan's opponents, Jeffrey Harris of the boutique firm Consovoy Park and U.S. Solicitor General Noel Francisco, argued that the sexual orientation and gender identity issues should be decided by Congress, not the high court. The EEOC, which has pushed for a broad reading of Title VII, did not join the Justice Department's brief in the Supreme Court.

At the hearing, Justice Sonia Sotomayor countered that the original Congress used very clear words about what the statute meant. "And regardless of what others may have thought over time, it's very clear that what's happening fits those words. At what point do we say we have to step in?" James Esseks, director of the ACLU's LGBTQ & HIV Project, said in a statement about Monday's ruling: "This is a huge victory for LGBTQ equality. Over 50 years ago, Black and Brown trans women, drag queens, and butch lesbians fought back against police brutality and discrimination that too many LGBTQ people still face. The Supreme Court's clarification that it's unlawful to fire people because they're LGBTQ is the result of decades of advocates fighting for our rights. The court has caught up to the majority of our country, which already knows that discriminating against LGBTQ people is both unfair and against the law."

John Bursch, vice president of appellate advocacy at Alliance Defending Freedom, said in a statement: "Americans must be able to rely on what the law says, and it is disappointing that a majority of the justices were unwilling to affirm that commonsense principle. Redefining 'sex' to mean 'gender identity' will create chaos and enormous unfairness for women and girls in athletics, women's shelters, and many other contexts. Civil rights laws that use the word 'sex' were put in place to protect equal opportunities for women. Allowing a court or government bureaucrats to redefine a term with such a clear and important meaning undermines those very opportunities--the ones the law was designed to protect." Marcia Coyle, National Law Journal, www.law.com, June 15, 2020.

2. CONVICTED OFFICIALS SHOULDN'T GET PUBLIC PENSIONS, SAY NORTH CAROLINA LAWMAKERS:

Bill before legislature is sparked by anger over a county employee who won government retirement benefits after embezzling nearly \$1 million. Anger over a government worker who got a pension despite embezzling a small fortune in public money has sparked a push in the North Carolina legislature to limit retirement benefits to officials who have been convicted of crimes. Government officials who are convicted of an offense -- such as embezzlement or fraud -- during their public service would give up pension benefits if they were not vested in the system by July 2007, [according](#) to the measure, which passed unanimously in a state House committee last week. Instead, convicted public workers would be able to receive only their contributions to the pension plan, plus interest.

Additionally, time rolled over after 2012 from previous employment or accrued through sick leave similarly would not be counted toward their retirement compensation, the bill said. The legislation comes after a local government employee in the Wake County Register of Deeds office sued the state for withholding pension benefits after she made headlines in connection with \$2.3 million that went missing during her time in office. Similar cases in the state's Buncombe County stoked ire over corrupt former officials drawing pensions.

In 2018, former Wake County employee Laura Riddick pleaded guilty to six counts of embezzlement and was ordered to serve five to seven years in prison, though she was given a work release. She was also directed to pay \$926,000 in restitution to the state. However, Riddick [sued](#) the state after the Retirement Systems Division attempted to take back her pension, which amounted to \$126,290 and was under the Local Governmental Employees' Retirement System (LGERS).

The Retirement Systems Division Director Steven Toole [said](#) the pension was an overpayment given her crime and rolled back all years of service she earned under the LGERS system, as well as sick leave and six years of service accrued in previous employment under the Teachers & State Employees (TSERS) retirement system. Riddick was still entitled to contributions she made during her public service, as well as interest.

But in April 2019, the court decided that Riddick's employment at TSERS should count toward calculations for her pension benefits, given that she had committed no crime under the previous employment.

In a statement in January 2019, state Treasurer Dale R. Folwell, who was also named in the suit, called on North Carolina residents to assist his department with detecting fraud from government employees. "It's important that felons who committed crimes while in service to the public aren't allowed to continue taking advantage of the state by drawing pension benefits that they shouldn't receive," Folwell said in the [statement](#). "Any dollar that is inappropriately sent out is a dollar that can never be used for the benefit of law-abiding retirees," he added. Sarah Min, Chief Investment Officer, www.ai-cio.com, June 8, 2020.

3. DEREK CHAUVIN, EX-COP CHARGED IN GEORGE FLOYD DEATH, COULD GET \$1.5M IN BENEFITS:

Fired Minneapolis cop Derek Chauvin could still receive more than \$1.5 million in pension benefits during his retirement years - even if he is convicted in [the killing of George Floyd](#), according to a new report. Chauvin, 44, was booted from the force and charged with

second-degree murder, but could still cash in because Minnesota, unlike some other states, does not allow for the forfeiture of pensions for employees convicted of felony crimes related to their work, [CNN reported](#).

The Minnesota Public Employees Retirement Association confirmed to the network that Chauvin, who had worked for the department since 2001, would remain eligible to file for his partially taxpayer-funded pension as early as age 50, though it would not specify the specific amount he would receive, the network reported.

Employees terminated voluntarily or for cause are eligible for future benefits unless they choose to forfeit them and receive a refund of all contributions made during their employment, according to the association. "Neither our board nor our staff have the discretion to increase, decrease, deny or revoke benefits," a spokeswoman told CNN. "Any changes to current law would need to be done through the legislative process."

Chauvin's attorney declined to comment to the network. Chauvin would likely be eligible for benefits around \$50,000 a year if he chose to start receiving them at age 55, according to a CNN analysis that took into account the former cop's tenure, 2019 payroll data, contract details, pension plan guidance and the Minneapolis Police Department salary schedules. The benefits could exceed \$1.5 million over a 30-year period - and could be even higher if he received significant amounts of overtime in past years, the calculation indicates.

Two of the other officers [who face charges](#) -- Thomas Lane and J. Alexander Kueng -- were rookies, but a third, Tou Thao, could still be eligible to receive benefits, employment records obtained by the network show. The Minneapolis Mayor's Office, Police Department and the local police union did not respond to requests for comment from CNN. D. Bruce Johnsen, a law professor at George Mason University who co-authored 2017 research on the matter, told the network that "pension forfeiture for misconduct is pretty rare."

"With this terrible tragedy it might be a good time to push in this direction," he added, noting that specific conditions that would allow for forfeiture would need to be carefully defined. Amanda Woods, *NY Post*, June 12, 2020.

4. HP OFFERS LUMP-SUM PAYMENTS TO PENSION PLAN BENEFICIARIES:

HP Inc., Palo Alto, Calif., is offering a lump-sum payment to former employees in its U.S. pension plan, the company disclosed in a 10-Q filing with the SEC. The offer window, which began June 3, gives "certain terminated vested participants" in the HP Inc. Pension

Plan to take a one-time voluntary lump-sum payment for the total present value of their future benefits, according to the June 5 filing. The window for the lump-sum election closes on July 15 and payments from plan assets to those who elect the lump sum will be made in the fourth quarter of the current fiscal year, which begins Aug. 1 and ends Oct. 31.

As of Oct. 31, HP's U.S. pension plan assets totaled \$12.017 billion, while projected benefit obligations totaled \$13.191 billion, for a funding ratio of 91.1%, according to the company's most recent 10-K filing. The HP Inc. Pension Plan had \$10.4 billion in assets as of Oct. 31, 2018, according to the company's most recent Form 5500 filing. HP officials could not be immediately reached for further information. Rob Kozlowski, *Pension & Investments*, www.pionline.com, June 8, 2020.

5. AT LEAST BOEING'S STOCK ISN'T IN ITS PENSION PLAN ANYMORE:

Controversial 2017 contribution of \$3.5 billion in company shares to the retirement program apparently was divested, long before the current share-tanking mess. Boeing stock, down 45%, is not a great place to be, given the grounded 737 MAX jets and the decline of airline orders. That kind of outcome is why Boeing's big dollop of company stock in its pension plan provoked a lot of angst.

In 2017, when the aerospace giant [contributed \\$3.5 billion million of its stock](#) to its defined benefit (DB) program, people evoked the Enron debacle, where a similar company allocation came to grief. Fortunately, it turns out that Boeing no longer has the stock in its plan, a good thing in light of the company's poor fortunes of late.

Three years ago, Boeing's shares were flying high and headed higher. But the anti-diversification move of tying retirees' and future beneficiaries' benefits partly to the company's future performance (the stock peaked in early 2019) seemed a stratospheric folly. Well, just for the record: Boeing's pension plan got rid of the offending stock--from the looks of it in the latter half of 2017, after owning it for a short time. This illustrates the power of either good planning or good luck.

As of year-end 2019, the company's plan--assets then: \$61.7 billion--was 20.5% below fully funded. If the plan had hung onto the Boeing shares, it would be about \$1 billion poorer today--this is the loss that the 2017 contribution of 14.4 million Boeing shares would've suffered. Now, that's not much, just 1.6% of the fund's assets. But the optics of putting company stock into a DB plan were what touched off the carping three years ago. Critics hearkened back to Enron, the energy-trading company that collapsed in 2001. The Enron DB program held a large amount of company stock, but so did the 401(k) plan. All

that was vaporized when the stock, once \$90 per share, went to zero.

“It’s an irresponsible thing to do certainly from the perspective of the plan participants,” said Daniel Bergstresser, a finance professor at the Brandeis International Business School, of the Boeing stock contribution in 2017, according to Bloomberg News. “Ideally, you would like to put assets in the pension plan that won’t fall in value at exactly the same time that the company is suffering.” He didn’t respond to a request for comment.

Nowadays, Boeing said its managers do not discuss individual assets in its DB holdings. But a review of company filings shows no employer stock at year-end 2017, nor in 2018 and 2019. The company said in its 2019 filing that it “didn’t anticipate” pumping in more capital to the fund in 2020, although it might at a later date. Like many corporate plans, Boeing barred new employees from joining (as of 2009) and froze accrual of new credits for workers’ years of service (2014). Boeing, once highly profitable, lost money in last year’s final quarter due to the MAX problem (\$1 billion) and in this year’s first period also was in the red (\$628 million) as COVID-19 decimated travel and airline orders. It suspended its dividend. Further, the company is laying off 13,000 workers

During Boeing’s April 27 shareholders meeting, management was asked: “Is there any risk to Boeing retiree pensions, given the current financial circumstances of the company?” CEO David Calhoun replied: “No, there’s nothing I see in our future that would put risk into the pension plans.” Larry Light, Chief Investment Officer, www.ai-cio.com, June 12, 2020.

6. THIRD REMEDIAL AMENDMENT CYCLE DATES SET FOR PRE-APPROVED DC PLANS:

IRS expects to issue opinion letters starting June 30 for preapproved defined contribution (DC) plans for the third remedial amendment cycle, according to [Announcement 2020-7](#). Employers will have until July 31, 2022, to adopt a newly approved plan. These dates don’t apply to preapproved defined benefit and 403(b) plans, which have their own remedial amendment cycles.

Preapproved plans are subject to six-year remedial amendment cycles. Early in each cycle, preapproved plan providers can apply for opinion letters on documents updated for changes in the qualification requirements. Once IRS issues opinion letters approving the documents, providers can make their plans available for employers to adopt during a window announced by IRS (usually about two years). Timely adoption allows an employer to rely on the provider’s opinion letter for the applicable cycle as if the opinion letter were the sponsor’s own determination letter (DL). Employers that modify the preapproved

document lose reliance on the provider's opinion letter but may be able to seek a DL.

Preapproved plan program. In 2017, IRS revamped the opinion letter program for preapproved plans, eliminating the old master and prototype (M&P) and volume submitter (VS) terminology. The program simply uses the term "preapproved plans" for all plan types. Standardized plans comprise only safe harbor provisions and cannot be modified by the adopting employer, while non-standardized plans do not have to be safe harbor and can be modified slightly. Both types of plans can still have a single plan document or offer a basic plan document with an adoption agreement.

The third remedial amendment cycle for preapproved DC plans will end on Jan. 31, 2023. Opinion letters for the third cycle cover changes to the qualification requirements on the 2017 Cumulative List in [Notice 2017-37](#). After IRS sends opinion letters to preapproved plan providers -- expected to start June 30 -- the agency will post a list of available preapproved plans on its [website](#). Employers will then have from Aug. 1, 2020, to July 31, 2022, to adopt a newly approved document.

DL applications. An adopting employer can rely on the provider's opinion letter if the employer makes no changes or only specified minor ones that don't cause the plan to fail to be identical to the provider's document (such as changing a provision's effective date or adopting certain IRS model amendments). Employers making other changes will lose reliance on the opinion letter but can request a DL in some circumstances by submitting:

- [Form 5307](#) for certain limited modifications to a non-standardized plan
- [Form 5300](#) for modifications that turn the preapproved plan into an individually designed plan or for other specified cases (such as any request regarding a non-standardized multiple-employer plan).

IRS will accept DL applications for the third six-year cycle between Aug. 1, 2020, and July 31, 2022. MERCER, www.mercer.com, June 9, 2020.

7. SAN FRANCISCO PENSION PLAN REPORTS DATA BREACH:

The San Francisco Employees' Retirement System (SFERS) has reported that a data breach to one of its partners' systems occurred in late February 2020, potentially, exposing the information of 74,000 current and prior members of the fund. The fund said that information from 10up Inc.'s servers was not removed, but it is not clear whether the information was viewed or copied by the outside source. The retirement system was alerted to the hack by 10up one month after its occurrence and it was told that 10up shut down the server and began an investigation once the breach was identified.

The information exposed includes users' personal information such as their address, full name, date of birth, bank routing numbers, IRS form 1099R information (excluding Social Security number) and information about their designated beneficiaries.

CIO recently [published a report](#) detailing insider tips for funds and businesses that are keen on ramping up their data security. "Your personal financial information may be misused," the fund said in a statement. It offered solutions for members who are interested in protecting their identity and offered a complementary year to identity protection program Experian's IdentityWorks for those plan participants who may face an increased risk of identity theft.

In explaining how the breach happened, SFERS said, "the retirement system contracts with vendors to provide SFERS members with online access to their account information. One of the vendors, 10up Inc., set up a test environment on a separate computer server, which included a database containing data from approximately 74,000 SFERS member accounts as of August 29, 2018. On March 21, 2020, 10up Inc. learned that this server had been accessed by an outside party on February 24, 2020."

The news makes SFERS the latest pension fund to be assailed by hackers. Last year, the [Oklahoma Police Pension](#) reported that hackers had stolen \$4.2 million from its coffers, however no pension benefits to members were affected. Cyber insurance companies reported that they've seen a growth in customers as many businesses prepare for potential breaches. In 2018, Rhode Island's pension fund sued Google for covering up data breaches, [compromising the personal information of 52.5 million users](#). Steffan Navedo-Perez, Chief Investment Officer, www.ai-cio.com, June 8, 2020.

8. IRS PROVIDES RELIEF FOR RETIREMENT PLAN ELECTIONS AND CONSENTS REQUIRED TO BE NOTARIZED OR WITNESSED: The Internal Revenue Service has relaxed spousal notarization and plan representative witness requirements in 2020 for retirement plan elections in [IRS Notice 2020-42](#). The notice addresses the physical presence requirement for notarization or witnessing of certain plan elections and provides temporary relief permitting remote notarization and witnessing subject to certain requirements.

For the period from January 1, 2020, through December 31, 2020, IRS Notice 2020-42 provides temporary relief from the physical presence requirement for any "participant election" witnessed by (i) a notary public of a state that permits remote electronic notarization, or (ii) a plan representative. A "participant election" includes any consent,

election, request, agreement or communication made by or from a participant, beneficiary, alternate payee or beneficiary.

However, this relief has particular requirements that must be met.

For an election required to be witnessed by a notary public, the physical presence requirement is deemed satisfied for an electronic system that uses remote notarization if executed via live-audio technology, provided that the system complies with state law requirements for notary publics.

For an election required to be witnessed by a retirement plan representative, the physical presence requirement is deemed satisfied for an electronic system if live audio-video technology is used that satisfies the following requirements:

- The individual signing the election must present a valid photo ID to the plan representative during the live audio-video conference. The transmission of a copy of the photo ID before or after the witnessing is not sufficient.
- The live audio-video conference must allow for direct interaction between the signing individual and the plan representative. A pre-recorded video of the person signing is not sufficient.
- The signing individual must transmit by fax or email a legible copy of the signed document directly to the plan representative on the same date it was signed.
- After receiving the signed document, the plan representative must (i) acknowledge that he or she has witnessed the signature under the requirements of this notice and (ii) transmit the signed document, including the acknowledgment, back to the individual under a system that satisfies the applicable notice requirements under Treasury Regulation § 1.401(a)-21(c) (which provides a safe harbor for electronic notices).

This relief from the personal presence requirement is temporary. It applies to elections such as COVID-19 distributions, spousal consent to distribution from a plan subject to qualified joint and survivor annuity (QJSA) requirements, retirement plan loan applications. The relief applies only to qualified retirement plan elections, and not to other types of benefits such as health and welfare plans. Yana S. Johnson, Jackson Lewis, www.benefitslawadvisor.com, June 5, 2020.

9. ACTUAL KNOWLEDGE UNDER THE SUPREME COURT'S INTEL DECISION; CAN THE DOL'S NEW ELECTRONIC DISCLOSURE REGULATIONS BRIDGE THE DIVIDE?:

Under ERISA, a plaintiff must file a lawsuit within six years of an alleged breach of fiduciary duty, or within three years if the plaintiff had “actual knowledge” of the breach. There has been a longstanding split among the circuits regarding what constitutes “actual knowledge” for purposes of determining whether ERISA’s three-year limitations period should apply. On February 26, 2020, the Supreme Court settled this issue in [*Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 \(2020\)](#). In that decision, the Supreme Court held that a participant must have a genuine subjective awareness of information, and, therefore, the mere availability of plan disclosures will not, in itself, establish “actual knowledge” of a potential breach of fiduciary duty under ERISA.

In light of this decision and the Department of Labor’s recent issuance of a [final rule](#) on the new safe harbor for the electronic delivery of retirement plan notices, plan sponsors will want to consider how this safe harbor might help them satisfy the actual knowledge standard set forth in *Intel*. (For more information on the final rule, please see our article [“At Last! DOL Issues New Electronic Disclosure Safe Harbor for Retirement Plans”](#)).

In the *Intel* case, plaintiff Sulyma worked for Intel and participated in two Intel retirement plans. Sulyma brought suit against the Investment Policy Committee of these plans alleging that the plan fiduciaries breached their fiduciary duty by over-investing in certain alternative investments (hedge funds, private equity and commodities). In its defense, Intel argued that Sulyma’s claim was barred by ERISA’s three-year statute of limitations because Sulyma was provided various ERISA-mandated disclosures about the plans’ alternative investments, giving him “actual knowledge” of the alleged breach of fiduciary duty more than three years prior to his filing of the lawsuit. The district court ruled in Intel’s favor, finding that Sulyma’s claims were barred by the statute of limitations even if, as Sulyma argued, he did not “remember reviewing” the disclosures. The Ninth Circuit reversed, holding that “actual knowledge” requires that the participant actually know the facts underlying his claim.

In unanimously upholding the Ninth Circuit’s decision, the Supreme Court focused on lay person and legal definitions and ERISA legislative intent to find that ERISA “requires more than evidence of disclosure alone...to meet §1113(2)’s ‘actual knowledge’ requirement, however, the plaintiff must in fact have become aware of that information.” The Court took no position on the Ninth Circuit’s analysis of the question of what exactly a plaintiff must actually know about a defendant’s conduct and the relevant law in order for the shorter three-year limitation period to apply.

In addition, the Court specifically emphasized that “nothing in this opinion forecloses any of the ‘usual ways’ to prove actual knowledge” such as using of electronic records to show

that a plaintiff viewed the relevant disclosures, and other evidence suggesting that the plaintiff took action in response to the information contained in them. The Court also made it clear that future plaintiffs could not claim lack of knowledge of such disclosures through “willful blindness” or false deposition testimony.

While the Court’s decision is a narrow one, it will likely make it more difficult for plan fiduciaries to succeed on a three-year statute of limitations defense. However, qualified retirement plan sponsors and fiduciaries will want to consider whether the new electronic disclosure safe harbor might help them satisfy the actual knowledge standard set forth in *Intel*. The DOL rule allows electronic delivery of any ERISA-required pension benefit plan notice if specified requirements are met. However, the new disclosure rule will not be helpful under the *Intel* decision unless it can be proven that the plaintiff *actually* read the disclosure being given out.

By delivering required ERISA notices and disclosures in accordance with the Final rule, it may be possible to better track a plan participant’s engagement with the disclosures such as the number of times a participant viewed the disclosure and for how long. In addition, it may also be worth adding an electronic acknowledgment or “scroll-wrap” feature with each disclosure, which would require a participant to acknowledge that they received and understand the information provided. Evidence of a participant’s acknowledgment of the disclosure might later serve as evidence in proving that the participant had “actual knowledge” and help reduce potential exposure to fiduciary liability. Michelle S. Lewis, Kelly A. Ultis, Jessica N. Agostinho, David Mustone and L. Scott Austin, www.huntonlaborblog.com, June 10, 2020.

10. DB PLAN SPONSORS SHOULD BE CONSCIOUS OF LIQUIDITY:

Many pension plan sponsors focus their investment discussions around expected returns and the commensurate risk associated with achieving those returns. However, in times of market volatility, overlooking the third dimension of investing, liquidity, can be disastrous and result in unintentional poor results.

What Is Liquidity? Liquidity is defined by Investopedia as the ease with which an asset, or security, can be converted to cash without affecting its market price. Liquidity can be seen across a spectrum where on one end you have assets that are highly liquid-i.e. converted to cash in a matter of days and weeks-and on the other end you have illiquid assets-i.e. that take years to convert to cash or take a significant discount to the current market value.

There are two main concerns as it relates to liquidity in an investment strategy:

- Having enough cash on hand to pay promised benefit payments such as annuities and bulk lump sums when due; and
- Not putting the plan in a position where assets are sold at market lows or results in changes to the risk profile of the portfolio in order to raise cash.

Normally, pension plans address liquidity concerns through rebalancing provisions in their investment policy statement (IPS). That generally works well in times when markets are stable and rebalancing can take place through cash flow management. When markets are not stable, and especially when they're negative, it can lead to sub-optimal outcomes that can affect a plan's long-term recovery.

The Current Market Environment: The current market environment has put stress on many organizations' revenue streams. For some, it has resulted in furloughs and layoffs, which may push some employees into early retirement. Many new retirees who need cash may elect a lump-sum payment if it's available. Lower employer contributions combined with increased benefit payments will further increase cash flow concerns and, thus, liquidity needs.

Ultimately, pension plans exist to pay benefit payments now and in the future. In order to make those payments, plans have to be sufficiently funded and have the cash available to make good on those promises.

How Market Volatility Affects Liquidity: When markets are volatile, the liquid assets that companies use to generate cash for making pension payments can become stressed. For more mature plans, this problem can be exacerbated by an already existing negative cash flow position such as when benefits payments are greater than contributions. Let's look at an example of plan that has a potential liquidity problem.

Sample Asset Allocation

- **\$47,000,000**
- **\$30,000,000**
- **\$20,000,000**
- **\$3,000,000**

Benefit payment profile:

- Monthly annuity benefit payments: \$500,000

- Lump-sum payments (deferred retirement option plan [DROP], cash balance, lump sum): \$100,000 to \$750,000

With this type of profile, after two to three months, the plan will need to raise cash to pay benefit payments. In a stable market environment, it should be straightforward to determine which liquid assets-equities and fixed income-to sell, especially if it helps in rebalancing to IPS targets. Another key point is that it will most likely not be feasible to sell off any alternatives to raise cash due to the illiquid nature of those investments.

However, in times of distress, the decision on where to raise cash becomes more complex. For example, if equity markets are down 15%, you may not want to sell off those investments to raise cash for benefit payments as you would be “selling low.” However, selling fixed income could actually increase your future portfolio risk and may not be optimal either.

This highlights why having a liquidity strategy as part of your overall investment strategy is crucial--it can help you avoid making decisions with unintended consequences and better position your portfolio for the long term.

What Should You Do Now?: Liquidity can be easily overlooked when markets are stable, however, when markets are volatile, you need to have a plan in place for how you will address liquidity. Here are a few steps you should take:

- Plan-it's important to understand and stress test your benefit payment and contribution profile to understand how much cash you may need (or not need) at any given time.
- Review asset allocation-ensure that you have the right mix of liquid assets in your portfolio that will allow you to make smart decisions for maintaining the right liquidity profile. This could also involve looking at other tools such as derivatives that can provide the risk/return/liquidity profile you need.
- Develop a market view-your organization probably has a view as to what will happen with markets in the short and medium term. Incorporate that into your pension investment decisions with an eye toward what circumstances will lead to a need for more cash.

Taking those action items into consideration will allow you to build a flexible action plan that will lead to better decision making for your pension portfolio. Tom Cassara and Michael Clark, River and Mercantile, *PLANSPONSOR*, www.plansponsor.com, June 12, 2020.

11. PRIVATE EQUITY RELATED BANKRUPTCY FILINGS SOARED IN MAY:

Private equity (PE) bankruptcy filings surged in May 2020, according to [PitchBook](#) data, with 16 tumbling into Chapter 11, making last month the worst for PE failures in four years. With major companies such as car rental agency Hertz Global Holdings and clothing retailer J. Crew seeking bankruptcy protection, PE filings in 2020's first five months are ahead of the same period last year (41 versus 37). PitchBook projects that full-year PE-related filings will eclipse 2019's count (73).

The culprit here is carrying too much debt, which left the affected companies vulnerable to the coronavirus-spurred economic shutdown. People aren't traveling as much, so they're not leasing autos as before. And already-suffering retail got slammed when no one could shop in physical stores. "Private equity is a levered bet on future economic growth," said Dylan Cox, a PitchBook PE analyst. "It performs exceptionally well during expansions, but its portfolio companies are especially vulnerable to economic contractions due to the highly levered nature of the industry."

At its filing, Hertz listed \$18.8 billion in debt. This grew out of the 2005 acquisition of the rental company from Ford Motor, using \$12 billion in debt financing. Six months later, the buyout group, led by Clayton, Dubilier & Rice, took a \$1 billion dividend, financed with more debt. J. Crew had \$1.7 billion in debt, left over from the 2011 purchase by TPG Capital and Leonard Green & Partners. Those PE players reportedly reaped a \$760 million dividend along the way.

Certainly, companies associated with travel and retail are in the biggest binds. For retail, the problem has been mounting since before the pandemic, in large part due to the rise in online shopping. The trend of retail bankruptcies got underway in 2017 with the filing of the Toys R Us chain. While not all the retail filings were PE-related, there is a strong PE component there. In the case of the toy chain, its 2005 buyout loaded it with \$5 billion in debt. Private equity firms Bain Capital and KKR, plus the real estate firm Vornado Realty Trust, took over the company.

"The high debt loads leave relatively little margin for error," said Wylie Fernyhough, a PitchBook PE analyst, "and do not set up these companies to succeed in an era where so many other competitors are coming to market with high-quality, direct-to-consumer products." Larry Light, Chief Investment Officer, www.ai-cio.com, June 8, 2020.

12. RETIREMENT UPDATE SUMMARY – JUNE 2020:

May 2020 Summary. The ongoing pandemic and associated economic crisis continued

into May, with many of the trends we saw in April continuing for a second month. Those trends include a volatile, although rebounding, equity market and pension discount rates that ended the month where they began. The ongoing moves towards economic reopening in Europe and North America continued to support market confidence, and the recent social unrest in the US has so far not done anything to reverse this trend.

The result of these market trends was equity appreciation of 5% - 7% in the US, with somewhat smaller gains internationally. Meanwhile, tightening credit spreads offset some steepening of the US Treasury yield curve. Most pension plans will most likely see a fairly small dip in discount rates from the end of April, with more mature plans seeing slightly larger drops. Discount rates continue to stay around the historic low levels seen at the end of February.

Pension plans with material equity exposure likely experienced funded status improvement in May, as the gains on equity portfolios would more than offset liability losses arising from decreases in the discount rate. To view the complete analysis click [here](#). River & Mercantile Solutions, www.riverandmercantile.us, June 7, 2020.

13. THINGS TO THINK ABOUT BEFORE APPLYING FOR DISABILITY BENEFITS:

Social Security is with you throughout life's journey. They're there for you if the unexpected happens and when you finally stop working as well. They provide vital financial support to tens of millions of American workers, primarily through retirement benefits. But they are also there for you if the unexpected happens and a serious medical condition stops you from working and being able to support yourself and your family.

In such cases, you may qualify for Social Security disability benefits, which replace a portion of lost income when a worker becomes seriously disabled. Here are three of the key factors we use to determine if you may qualify for Social Security disability benefits:

- You must have a lasting medical condition so severe that it prevents you from doing the work that you did in the past or adjusting to other types of work;
- Your physical or mental impairment(s) must have lasted or be expected to last at least a year or result in death; and
- You must have worked long enough - and recently enough - in jobs covered by Social Security.

To learn more, please visit the [disability home page](#). You become eligible for Social Security benefits by working and paying FICA taxes, which translate into Social Security "credits." How many credits you need to receive disability benefits depends on how old

you are when you become disabled.

For example, if you become disabled at age 31 or older, you generally must have earned at least 20 credits in the 10 years immediately before you became disabled. Twenty credits are equal to five years of substantial earnings. Younger workers may qualify with fewer credits.

To see how many credits you have earned and to estimate future benefits, please log in to or create your [my Social Security](#) account. Those who have not worked enough to qualify for Social Security benefits may be eligible for help through our Supplemental Security Income program, or “SSI.” SSI provides financial assistance to disabled children and adults, as well as the aged and blind people, who have little or no income or resources. Learn more on our [SSI home page](#) web page. Social Security helps you and millions of other Americans secure today and tomorrow by providing important financial benefits, information, and planning tools. Learn more by visiting their [website](#). SSA, www.blog.ssa.gov, June 11, 2020.

14. PLANNING A FUNERAL? KNOW YOUR RIGHTS:

During the COVID-19 pandemic, many of us have taken on new roles in our families and communities. You may be delivering groceries, helping neighbors with yardwork, or hosting video check-ins with quarantined relatives. But if someone asked you to help plan a funeral, would you know where to start? The FTC’s information about funeral goods and services, types of funerals, and [your rights](#) can help. The FTC enforces the Funeral Rule, which makes it possible for you to [compare prices](#) and choose only the things you want or need.

If you can’t leave home or travel to a funeral provider right now, you can still get information about what it offers - and how much those goods and services cost. The Rule says funeral homes must [give you information about their products](#) and services, including their prices, over the phone if you ask for it. Some funeral providers also post price information online.

When you make arrangements by phone, online or in person, [you have the right](#) to:

- buy only the goods (like a casket) and services (like a memorial service) that you want, instead of being required to buy a “package”
- use an alternative container -- made of pressed wood, cardboard or other material -- instead of a casket for cremation
- use a casket or urn you bought somewhere else

- get a written statement after you decide what you want, but before you pay. The statement must list the price for each good or service you chose, and the total cost. You have a right to get the written statement before you pay, even when you make arrangements by phone.

When you go to a funeral home to make arrangements, [you have the right](#) to:

- get an itemized price list when you start talking about funeral arrangements and prices
- see price lists for caskets and outer burial containers before you discuss or look at them

Use the FTC's [Funeral Pricing Checklist](#) to ask about available options and compare costs at different funeral providers. You can also use the Checklist to make plans in advance, or pre-plan a funeral. If you or a loved one make advance arrangements with a funeral provider, make notes about the plans, and share them with friends and family. Bridget Small, Consumer Education Specialist, FTC, www.ftc.gov, June 9, 2020.

15. DEALING WITH A DECEASED RELATIVE'S DEBT:

Especially during this time of crisis, dealing with the death of a loved one is hard. Dealing with a debt collector calling about their debts can make it even harder. If you're in this situation and a debt collector calls, it's important to know who is responsible for those debts, and what a debt collector can - and cannot - do to collect payment.

Here are some things to know:

- **A debt doesn't go away when a person dies.** But that doesn't (usually) mean you owe it, either. The deceased person's estate owes the debt. If there isn't enough money in the estate to cover the debt, it typically goes unpaid. There are some exceptions, though. For example, you could be responsible if you were a co-signer, or in some cases if you're the person's spouse. Learn about other [possible exceptions to the rule here](#).
- **Debt collectors may only talk with certain people about a deceased person's debt.** Collectors can discuss the debt with the deceased person's spouse, parent (if the deceased was a minor child), guardian, executor or administrator, or any other person authorized to pay debts with assets from the estate. The debt collector may not talk to anyone else about these debts. If they don't know how to reach the right person, they can contact other relatives to ask for the correct contact information. But they can call each person only once, and they can't get

into the details of the debt or ask the relative for payment on these calls to gather contact info.

- **Debt collectors may not bend the truth to make you pay.** Debt collectors cannot lie or imply that you or any other family member legally has to pay the estate's debts out of your own pocket. It's illegal for them to harass you to pay the debt yourself. If the deceased left debts and no assets, it's usually not your responsibility to pay.
- **You have rights.** If you think you don't owe some (or all) of the debt, or you just don't recognize it, send the collector a letter disputing it. Be as specific as possible about why you think the debt is wrong – but give as little personal information as possible. Once you get the validation notice (which says how much you owe, to whom, and what to do if you don't think you owe the debt), you have 30 days to send the dispute letter. By law, the collector then must stop contacting you – though the debt doesn't go away. But, if the collector sends you written verification of the debt, they can start contacting you again. If the collection calls get to be too much, you can stop them. Just send the collector a letter telling them to stop contacting you and the estate. Keep a copy for your records. Stopping the calls won't cancel the debt. You still might be sued or have debt reported to a credit bureau.

For more information, read [Debts and Deceased Relatives](#). Ari Lazarus, Consumer Education Specialist, FTC, www.ftc.gov, June 10, 2020.

16. DID YOU KNOW ALBERT EINSTEIN SAID THIS?

"No problem can be solved from the same level of consciousness that created."

17. INSPIRATIONAL QUOTE:

"To plant a garden is to believe in tomorrow." - Audrey Hepburn

18. TODAY IN HISTORY:

On this day in 1812, the War of 1812 begins as US declares war against Britain.

19. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.