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Supreme Court ruling on sex discrimination issued days after final ACA 1557 regulations

By Anu Gogna and Ben Lupin

On June 15, 2020, the U.S. Supreme Court ruled that the firing of employees due to their gender identity or sexual orientation status is unlawful discrimination "on the basis of sex" under Title VII of the Civil Rights Act of 1964. Just three days prior to the ruling, on June 12, 2020, the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS) **announced** the issuance of **final regulations** (accompanied by a **fact sheet**) on Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age or disability in health programs and activities receiving federal financial assistance (FFA). These final Section 1557 rules remove protections against discrimination based on gender identity, among other changes.

In light of the Supreme Court's decision, it is unclear whether HHS will withdraw the affected portion of final Section 1557 regulations or clarify that discrimination on the basis of sex includes gender identity.

In This Issue

1 Supreme Court ruling on sex discrimination issued days after final ACA 1557 regulations
3 IRS, PBGC and DOL provide retirement-related COVID-19 extensions
5 Pay implications of CARES Act loan program
7 PCORI fee due by July 31, 2020
8 IRS announces 2021 HSA limits
9 Supreme Court limits ability of DB plan participants to sue for fiduciary breach
10 Michigan auto insurance reforms may affect group health plans
12 Retirement offerings in the *Fortune* 500: 1998 – 2019

U.S. Supreme Court Decision

In *Bostock v. Clayton County,* the Supreme Court held that Title VII, which prohibits discrimination in the workplace on the basis of race, religion, national origin and sex, extends to sexual orientation and gender identity. The court, by a vote of 6 to 3, said "sex" is a distinct characteristic but inseparable from the concepts of sexual orientation and gender identity, and therefore workplace discrimination on that basis is illegal.

Final ACA Section 1557 regulations

The final Section 1557 regulations repeal protections against discrimination based on gender identity, limit the scope of who is a covered entity, and eliminate the notice and tagline requirements in all substantial communications. They make the following changes to the existing regulation, which was finalized in 2016 and was a source of ongoing litigation:

- **Definitions.** The definitions in the 2016 regulation are repealed, such as "covered entity" and "on the basis of sex" (which included "gender identity" and "termination of pregnancy"). As a result, the protections in Section 1557 against discrimination based on gender identity and termination of pregnancy are removed.
- **Scope of Section 1557.** Section 1557 now applies to 1) entities principally engaged in health care, and 2) health care activities of other entities to the extent those activities are funded by HHS. Section 1557 would not apply to employer-sponsored group health plans, excepted benefits or church plans unless they receive FFA and are principally engaged in the business of providing health care. In addition, employer group waiver plans and Medicare Part D Retiree Drug Subsidy plans would be subject to Section 1557 to the extent they receive FFA.
- **Notice and taglines.** The final regulations repeal the previous mandate for covered entities to distribute non-discrimination notices and tagline translation notices in at least 15 languages in all significant communications;

however, the final regulations still require covered entities to provide taglines when necessary to ensure meaningful access by individuals with limited English proficiency. The 2016 regulation's requirement that foreign language translators and interpreters be provided for non-English speakers also remains. The government estimates that eliminating the mandate for entities to send excessive notices and taglines will result in a reduction of administrative costs of $2.9 billion over the next five years.

- **Enforcement.** The final regulations provide that Section 1557 must be enforced in a manner consistent with other statutes, such as the Religious Freedom Restoration Act, federal conscience-protection laws and the First Amendment to the Constitution. OCR does not adopt a new explicit definition of "on the basis of sex" but will interpret "sex" solely as "biological sex" (which HHS defines as a person's genetic sex at birth). As such, portions of the 2016 regulations that are duplicative of, or inconsistent with, the long-standing civil rights regulations are removed.

The final Section 1557 regulations will be effective 60 days following publication (which is scheduled for June 19, 2020).

The intersection of Section 1557 and the *Bostock* case

While the *Bostock* case was specifically about employment discrimination, the same legal interpretation will likely carry over to other areas, most notably health care.

While the *Bostock* case was specifically about employment discrimination, the same legal interpretation will likely carry over to other areas, most notably health care.

The Trump administration argued in the final Section 1557 regulations that the rules set forth in the 2016 regulation were an impermissible overreach and that no civil rights law passed by Congress extended employment protections based on gender identity. The *Bostock* decision puts this argument in doubt and seems to strongly support those who have and will file legal challenges to the new final regulations.

While the *Bostock* ruling does not directly impact the final Section 1557 rules (because Section 1557 incorporates the nondiscrimination protections in Title IX of the Education Amendment Act of 1972 [Title IX]), it raises concerns about HHS's interpretation of the term "on the basis of sex" to exclude gender identity since HHS acknowledges in the preamble that "Title VII case law has often informed Title IX case law with respect to the meaning of discrimination on the basis of sex."

Future health care discrimination litigation

Due to the changes to the scope of the term "sex" for Title VII purposes set forth in *Bostock* and the final Section 1557 rules, there remains an open issue on the requirement for employer-sponsored health plans to provide coverage for medically necessary procedures connected to gender identity. The *Bostock* ruling did not specifically address this issue, which is currently being litigated in lower courts.

This issue will likely need to be litigated and could make its way to the Supreme Court. In the meantime, employers sponsoring group health plans that exclude medically necessary gender identity-related procedures should consult with legal counsel to review the *Bostock* case and determine if any changes will be needed to the terms of their plan.

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IRS, PBGC and DOL provide retirement-related COVID-19 extensions

By Gary Chase, Stephen Douglas, Bill Kalten, Mike Pollack and Maria Sarli

The Department of Labor (DOL) has issued **Employee Benefits Security Administration Disaster Relief Notice 2020-01**, which extends certain deadlines under ERISA and the Internal Revenue Code that apply to retirement plans. The relief is in response to President Trump's declaration of a national emergency due to the COVID-19 outbreak. In addition, the DOL and IRS jointly issued separate **guidance** (referred to hereafter as the joint notice) for health and welfare plans, which also contains provisions that affect claims procedures under retirement plans.[1] In general, the relief is available from March 1, 2020, until 60 days after the date that the end of the COVID-19 emergency is declared (the "Outbreak Period"), provided certain requirements are met.

The DOL also issued related **FAQs** to help participants and beneficiaries, plan sponsors and employers affected by the COVID-19 outbreak understand their rights and responsibilities under ERISA.

Separately, the IRS issued **Notice 2020-23** and the Pension Benefit Guaranty Corporation (PBGC) **issued relief** that extended deadlines until July 15, 2020, for certain tax payments and filings. The extensions only apply to taxes and filings that would otherwise have been due (including extensions) on or after April 1, 2020, and before July 15, 2020.

Reporting and disclosure requirements

The DOL notice extends the deadlines for certain reporting and disclosure requirements under ERISA that are not covered under the joint notice. An employee benefit plan will not be in violation for a failure to timely furnish notices, disclosures or documents during the Outbreak Period provided that the plan and responsible fiduciary 1) act in good faith and 2) furnish the notice, disclosure or document as soon as administratively practicable under the circumstances.

This relief may apply to such disclosures as the annual funding notice, summary plan descriptions, summary annual reports, periodic pension benefit statements, participant disclosures related to participant-directed retirement plans, investment mapping notices and blackout notices.

Under the good faith standard, disclosures may be distributed electronically (e.g., via email and text messages), but plan sponsors should discuss with legal counsel whether the "good faith" requirement would be met by using an electronic form of distribution even when the normal form of distribution (e.g., regular mail) was still available, and whether that electronic distribution needs to be followed up as soon as administratively practicable with a distribution that meets the usual requirements.

Under the good faith standard, disclosures may be distributed electronically (e.g., via email and text messages).

Plan loan and distribution procedural requirements

During the Outbreak Period, the DOL will not treat a plan as failing to follow a plan loan or distribution procedural requirement that is imposed under the terms of the plan if:

- The failure is solely attributable to the COVID-19 outbreak.
- The plan administrator makes a good-faith diligent effort under the circumstances to comply with the requirement.
- The plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

The DOL notice clarifies that this relief does not extend to spousal consent or other requirements under the jurisdiction of the IRS.

Timing for forwarding participant contributions and loan repayments to the plan

In general, an employer must forward participant contributions and loan repayments to the retirement plan by the earliest date on which the employer can segregate these amounts from employer assets, but no later than the 15th business day of the month following the month in which the amounts were paid to or withheld by the employer.

[1] See "**Health and welfare plan time frames extended due to COVID-19**," *Insider*, May 2020.

The DOL will not take enforcement action due to a temporary delay in forwarding loan payments or contributions to the plan during the Outbreak Period provided that 1) the delay is solely due to the COVID-19 outbreak and 2) the employer and service providers act reasonably, prudently and in the interest of employees to comply as soon as administratively practicable under the circumstances.

CARES Act compliance

The DOL notice states that any person satisfying the requirements under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and any applicable IRS guidance will not be in violation of ERISA (including the adequate security and reasonably equivalent basis requirements for loans) in connection with either 1) making a loan in accordance with the loan relief provisions provided under the CARES Act or 2) delaying loan repayments as permitted under the CARES Act.

In addition, the DOL will treat a plan as operating under the plan terms with respect to the CARES Act provided the plan is 1) amended by the last day of the first plan year beginning on or after January 1, 2022 (or such later date as permitted by the Treasury Department), and 2) the amendment meets the conditions of the CARES Act.

Distribution of blackout notices

A plan administrator is generally required to provide 30 days' advance notice of any temporary "blackout period" in which participants' and beneficiaries' rights under the plan are temporarily suspended, limited or restricted. For instance, a period of suspension, limitation or restriction of more than three consecutive business days on a participant's ability to direct investments, obtain loans or obtain other distributions from the plan results in a blackout period and triggers the advance notice. DOL regulations allow the notice to be sent less than 30 days prior to the blackout period if the delay is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing.

Similar to the relief provided above for other notices regulated by the DOL, there will not be a failure to timely furnish a blackout notice during the Outbreak Period provided that the plan and responsible fiduciary 1) act in good faith and 2) furnish the notice, disclosure or document as soon as administratively practicable under the circumstances.

The DOL focus will be on supporting plan compliance, including offering grace periods or other relief where appropriate.

General ERISA fiduciary compliance

In its notice, the DOL reminds plan fiduciaries to generally act reasonably, prudently, and in the interest of participants and beneficiaries, and to make reasonable accommodations to prevent the loss of benefits or undue delay of benefit payments, including when participants and beneficiaries fail to comply with timing requirements. The DOL focus will be on supporting plan compliance, including offering grace periods or other relief where appropriate.

Claims procedures

While the DOL and IRS joint notice primarily focuses on health and welfare plans, it does include an extension of claims procedure deadlines applicable to retirement plans. The joint notice extends the deadlines under a retirement plan's claims procedures for an individual to file a claim for benefits and to file an appeal of an adverse benefit determination. Specifically, in determining these deadlines, the Outbreak Period will be disregarded.

IRS relief

IRS **Notice 2020-23** provides limited relief for several important retirement and health and welfare plan filings, including:

- Form 5500
- Form 8955-SSA
- Form 990 (which is filed by voluntary employees' beneficiary associations)
- Form 990-T (to report unrelated business income tax incurred by a trust)
- The April 15 deadline for distributing excess section 402(g) deferrals

The notice automatically extends the deadlines (including any extensions) for filings due on or after April 1, 2020, and before July 15, 2020, until July 15, 2020. This effectively means that the extension is only available for certain non-calendar-year plans and/or tax years.

The IRS has also **extended** the remedial amendment period for section 403(b) plans and the deadline to adopt a preapproved defined benefit plan.

PBGC relief

The PBGC **extended** the deadlines for premiums and filings that are not on the "excepted list"[2] – although individual extensions for filings on the excepted list may be requested. The PBGC provides relief from certain deadlines when the IRS delays the Form 5500 due date because of a major disaster. PBGC premiums and filings (that are not on the excepted list) that would otherwise be due (including extensions) on or after April 1, 2020, and before July 15, 2020, are now due by July 15, 2020. In particular, the PBGC relief applies to both premium payments and section 4010 filings.

Going forward

Plan sponsors should consider whether the DOL, IRS and PBGC extensions are needed to timely comply with any of the applicable deadlines, and if so confirm whether they meet the requirements to be eligible for the relief.

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[2] Filings on the excepted list are particularly important or time-sensitive filings that may indicate a high risk of harm to pension plan participants or the PBGC's insurance program.

Pay implications of CARES Act loan program

By Mitchell Bardolf, Gary Chase and Steve Seelig

Since the Coronavirus Aid, Relief, and Economic Security (CARES) Act became law on March 27, the Department of Treasury has opened its lending and grant program for airlines, air cargo and businesses critical to maintaining national security, while midsize employers (up to 15,000 employees and up to $5 billion in revenue) wait for the Main Street Lending Program (MSLP) to open. Both groups of recipients will be subject to executive pay and employee retention restrictions. The following focuses on programs available under the MSLP. The rules that apply to airlines, air cargo and businesses critical to maintaining national security are similar in nature and effect, although the duration of the limits and the nature of the support provided differ from those under the MSLP.

Statutory language

Three main limits are applied to companies that take loans or receive loan guarantees or other investments under the CARES Act. The law is not entirely clear on the duration of the loans that will be made available for all other businesses; however, **recent guidance** provided by the Federal Reserve, which includes FAQs and term sheets for three different loan facilities, offers details on the different loan amounts, terms and loan period that would apply.

1. **Buybacks and dividends:** MSLP loan recipients are prohibited from doing any stock buybacks or dividend payments until one year after the assistance is repaid. The Treasury secretary could waive this provision under limited circumstances.
2. **Employment, compensation and benefit levels:** Midsize companies with between 500 and 15,000 employees must make commercially reasonable efforts to maintain their payroll and retain their employees during the time the eligible loan is outstanding.
3. **Executive compensation limits:** Two tiers of limits apply to all loan recipients from the date of the loan until one year after the loan is repaid (i.e., the loan period):

- No officer or employee whose total compensation exceeded $425,000 in 2019 may receive either of the following:
  - Pay in excess of 2019 calendar-year levels during any 12 consecutive months during the loan period
  - A severance payment at termination that exceeds two times the maximum total compensation received during calendar year 2019
- No officer or employee whose total compensation exceeded $3 million in calendar year 2019 may receive compensation during any 12 consecutive months during the loan period above the sum of $3 million plus 50%

of the excess of the $3 million the employee received during calendar year 2019. For example, an executive who received $5 million for calendar year 2019 would be limited to $4 million for the remainder of the loan period. Severance limits apply as above.

The CARES Act does not specify the form in which compensation will be paid. As discussed below, this could mean a company would need to determine which elements of pay would be limited during the term of the loan.

Items included in total compensation

The term "total compensation" includes salary, bonuses, awards of stock and other financial benefits provided by an eligible business to an officer or employee of the eligible business. It appears this definition is the same as that presented in the company's Summary Compensation Table (SCT), although it is not clear whether "other financial benefits" would include an executive pension disclosed in the Pension column.

The mismatch between the company fiscal year and the 12-month period that starts when the loan or loan guarantee is received would also create a mismatch for counting the pay limits relative to the typical grant cycles in place for calendar-year companies.

For example, a calendar-year fiscal-year company that makes its equity grants in February 2020 and then receives a loan on May 1, 2020, would not include those grants already made toward the 12-month compensation for the period from May 1, 2020, to April 30, 2021. Those grants do not count toward the pay limitations, nor are they to be counted for 2019 pay levels upon which the pay limits are based.

What would count is salary paid and bonuses earned for the 2020 calendar year, plus equity grants made as part of the 2021 grant cycle.

Imposing the CARES Act pay limits

Because of the mismatch between fiscal year 2020 pay cycles and the 12-month cycle from when the loan is taken, following is the order in which pay elements would need to be counted for calendar-year companies:

1. Count salary (recognizing that some companies will reduce salary levels)
2. Count annual bonus
3. Count early 2021 equity/long-term incentive plan (LTIP) grants

"Total compensation" includes salary, bonuses, awards of stock and other financial benefits provided.

Companies that must impose pay limits will be allowed to determine the pay elements that would be reduced during the initial 12-month period, discussed below.

For companies looking for ways to conserve cash in the near to medium term, neither deferring compensation until later years nor changing the form of payment from cash to equity would help reduce total compensation levels, assuming the SCT rules apply:

- Deferred cash bonuses are still counted as SCT total compensation if those amounts are *earned* during the fiscal year. This means that pushing out cash settlement to a later date, which often is permitted under the tax code, does not reduce the 12-month calculation of total compensation; however, if a deferred bonus is subject to added vesting, it would not be considered *earned* for the current fiscal year and could reduce the amount of bonus for the year.
- Cash bonuses settled in shares would either remain in the Bonus column for the fiscal year or appear in the Equity column based on grant date value (regardless of the vesting schedule). This means a layering of additional vesting for a stock settled bonus may not reduce the total compensation in the same manner as an unvested bonus deferral.

Deferrals (or new grants) that could help a company manage its expenses and cash for the current year still may be counted from a CARES Act perspective, unless the Department of Treasury issues rules providing an exception.

Following are options companies may consider when determining which pay element to reduce:

- **Reduce salary.** Traditionally, companies have preferred to maintain salary levels to permit executives to meet monthly financial obligations; however, some companies are reducing executive salary levels as non-salaried workers are laid off or have their hours reduced.
- **Reduce annual cash bonus.** Only a reduction of the cash bonus would work. A deferral of a cash bonus payment would not reduce SCT total compensation unless additional vesting delayed the date it was considered earned beyond the end of the 12-month period.

- **Reduce LTIP awards.** Because the February 15, 2020 grants worth $195,000 were not counted for the 12-month limit, it might make sense for a company to decide to limit the February 15, 2021 grant to $161,250.

Note that the above reductions reference just the first 12 months of the loan. The rules impose a pay restriction for *any* 12-month period, so care must be taken to monitor the pay impact on a rolling 12-month basis. In addition, the same questions about what elements of compensation will be limited will be asked about executives with total compensation in excess of $3 million during 2019 who will be required to cut back their pay over that level by 50%.

Going forward

Employers should continue to monitor federal agency guidance and other developments on how these programs will be implemented, whether their loan terms are favorable and how widely they will be utilized.

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PCORI fee due by July 31, 2020

By Anu Gogna and Ben Lupin

Under the Affordable Care Act, issuers of specified health insurance policies and self-insured health plan sponsors are required to pay a fee to help fund the Patient-Centered Outcomes Research Institute (PCORI). The fee is based on the average number of covered lives under the policy or plan and must be reported once a year on the second quarter IRS Form 720 and paid annually by July 31.

On June 8, 2020, the IRS announced in **Notice 2020-44** that the PCORI fee amount for plan years ending on or after October 1, 2019, and before October 1, 2020, is *$2.54 per covered life* (up from $2.45 previously).

The following is a brief Q&A on the general requirements for filing the PCORI fee.

The [fee] for plan years ending on or after October 1, 2019, and before October 1, 2020, is $2.54 per covered life.

Q. When did the PCORI fee go into effect and when does it end?

A. The PCORI fee initially applied to specified health insurance policies and applicable self-insured health plans with policy or plan years ending after September 30, 2012, and before October 1, 2019; however, in December 2019 the fee was extended for an additional 10 years under the Further Consolidated Appropriations Act, 2020 (H.R. 1865) and now applies through plan years ending before October 1, 2029.

Q. What types of plans are subject to the PCORI fee and how much is the PCORI fee?

A. The IRS has provided charts on which **types of insurance coverage or arrangements** are subject to the PCORI fee as well as **filing due dates and applicable rates**, which depend on the month on which a specified health insurance policy or applicable self-insured health plan ends. (Note: The IRS is expected to update its due dates and rates chart to reflect the guidance in Notice 2020-44.)

Q. Who pays the PCORI fee?

A. For fully insured plans, the insurance carrier is responsible for filing **Form 720** and paying the PCORI fee; therefore, employers with only fully insured health plans have no filing requirement (but will be charged by the carrier for the cost of the fee). If an employer sponsors a self-insured health plan, the employer must file Form 720 and pay the PCORI fee. For self-insured plans with multiple employers, the named plan sponsor is generally required to file Form 720.

Q. How do you determine the average number of covered lives under the policy or plan in order to calculate the PCORI fee?

A. The final PCORI regulations require issuers of *fully insured plans* to use one of four alternative methods – 1) the actual count method, 2) the snapshot method, 3) the member months method, or 4) the state form method – to determine

the average number of covered lives under a specified health insurance policy for a policy year.

Plan sponsors of *self-insured plans* must use one of three alternative methods: 1) the actual count method, 2) the snapshot method, or 3) the Form 5500 method.

The method used can be changed from year to year.

Notice 2020-44 provides transition relief for plan years ending on or after October 1, 2019, and before October 1, 2020, which provides that issuers and plan sponsors may use any reasonable method for calculating the average number of covered lives, provided the method is applied consistently for the duration of the plan year.

Q. Do COBRA-qualified beneficiaries and retirees or other former employees count as “covered lives” for the purpose of calculating the PCORI fee?

A. These covered individuals and their beneficiaries must be taken into account in calculating the average number of covered lives.

Q. Can the PCORI fee be paid from plan assets? Is the PCORI fee deductible?

A. The Department of Labor has stated that the PCORI fee *cannot* be paid from plan assets. In other words, the PCORI fee must be paid out of the general assets of the employer plan sponsor. It is not a permissible expense of a self-insured plan and cannot be paid in whole or in part by participant contributions. Furthermore, the PCORI fee expense should not be included in the plan’s cost when computing the plan’s COBRA premium; however, the IRS has **indicated** the fee is a tax-deductible business expense for employers with self-insured plans.

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IRS announces 2021 HSA limits

By Cindy Brockhausen and Rich Gisonny

In **Revenue Procedure 2020-32**, the IRS announced the 2021 calendar-year inflation-adjusted dollar limits for health savings accounts (HSAs). The Revenue Procedure contains the maximum annual HSA contribution amounts, along with the minimum annual deductibles and maximum out-of-pocket expenses for high-deductible health plans (HDHPs) with which HSAs are paired. These amounts are updated annually to reflect cost-of-living adjustments.

For employers sponsoring HSAs and HDHPs, the new limits will affect benefit plan administration and communication materials for 2021. They may also influence HDHP designs and HSA contribution strategies for 2021.

The 2021 HSA catch-up contribution amount for participants attaining age 55 by December 31, 2021, remains $1,000. This amount is set by statute and is not subject to cost-of-living adjustments.

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2021 vs. 2020 HSA and HDHP limits

Self-only coverage	2020	2021	Change
Maximum annual HSA contribution	**$3,550**	**$3,600**	**+$50**
Minimum annual deductible for HDHP	**$1,400**	**$1,400**	**$0**
Maximum annual out-of-pocket expense limit for HDHP	**$6,900**	**$7,000**	**+$100**

Family coverage	2020	2021	Change
Maximum annual HSA contribution	**$7,100**	**$7,200**	**+$100**
Minimum annual deductible for HDHP	**$2,800**	**$2,800**	**$0**
Maximum annual out-of-pocket expense limit for HDHP	**$13,800**	**$14,000**	**+$200**

Supreme Court limits ability of DB plan participants to sue for fiduciary breach

By Stephen Douglas, Bill Kalten and Maria Sarli

In a 5-4 decision, the U.S. Supreme Court ruled in ***Thole v. U.S. Bank*** that two retired participants in a defined benefit (DB) pension plan did not have the legal right to bring a lawsuit against plan fiduciaries for alleged mismanagement of plan assets. According to the majority, because of the nature of DB plans, the participants had not suffered any individual financial loss. They would receive the same exact pension benefit whether they won the case or not, and therefore lacked standing to sue.

The *Thole* decision significantly protects DB plan fiduciaries against participant claims of mismanagement of plan assets and will likely result in a drop in DB plan fiduciary litigation. This is particularly helpful to sponsors now as many plans are experiencing COVID-19-related investment losses.

Background

In a DB plan, participants are generally guaranteed a fixed periodic payment upon their retirement. This benefit does not depend on the value of plan assets at any particular time. Absent a distress or involuntary plan termination, the employer must cover any funding shortfall. As a result, participants will generally get the benefits promised by the plan and typically suffer no actual economic harm due to allegedly improper fiduciary conduct that leads to diminished plan assets (e.g., poor investment decisions, excessive plan fees).

In *Thole,* two retired participants in U.S. Bank's DB plan filed a lawsuit alleging that the defendants breached their fiduciary duties and violated ERISA's prohibited transaction rules by adopting an overly risky and undiversified investment strategy resulting in significant plan losses and causing the plan to become underfunded.

During the litigation, however, the value of the plan's assets increased (in significant part through additional contributions) so that the plan became overfunded, meaning there was a surplus of funds available to cover current and future retirement benefits. As a result, the district court dismissed the participants' claims as moot. The Eighth Circuit affirmed the dismissal on grounds that plan participants did not have ERISA statutory standing to assert breach of fiduciary duty claims when a plan is overfunded, because there is no "actual or imminent injury."

This is particularly helpful to sponsors now as many plans are experiencing COVID-19-related investment losses.

The Supreme Court agreed to review the Eighth Circuit's ruling and directed the parties to also address whether the plaintiffs had demonstrated Article III standing under the U.S. Constitution — a prerequisite to commencing any action in federal court.

The *Thole* decision

Under Article III, a plaintiff must demonstrate (1) that he or she suffered *an injury in fact that is concrete, particularized, and actual or imminent*; (2) that the injury was caused by the defendant; and (3) that the injury would likely be redressed by the requested judicial relief.

The Supreme Court held that the two participants had no concrete stake in the lawsuit because they had not sustained any monetary injury and therefore lacked standing to sue under Article III.

The court rejected the four arguments the participants made to demonstrate Article III standing:

1. **By analogy to trust law, an ERISA participant has an equitable or property interest in the plan, and injuries to the plan are therefore injuries to the participants.** The court deemed this analogy inappropriate because in the private trust context, the ultimate amount of money beneficiaries receive typically depends on how well the trust is managed. By contrast, DB plan participants' benefits are fixed, regardless of how well or poorly the plan is managed.
2. **They had standing as representatives of the plan itself.** The court rejected this assertion because the participants themselves had not "suffered an injury in fact," or been legally or contractually appointed to represent the plan.
3. **ERISA specifically provides participants in a DB plan with a general cause of action to sue for restoration of plan losses.** Citing *Spokeo v. Robins* (2016), the court

indicated that, even with the existence of a statutory cause of action, the participants still need to demonstrate an injury in fact, which they had not done.

4. **Participants and beneficiaries need to be able to bring fiduciary breach claims to constrain fiduciary misconduct.** The majority opinion called this a "faulty premise," as DB plans are regulated and monitored in multiple ways. For example, employers have strong incentives to root out misconduct because they are entitled to plan surpluses and are often on the hook for plan shortfalls. In addition, the Department of Labor has motive to avoid the financial burden of failed DB plans, which are backstopped by the Pension Benefit Guaranty Corporation (PBGC).

Going forward

The protection provided by the *Thole* decision for DB plan fiduciaries may be greatest where the plan in question is overfunded; however, the Supreme Court majority opinion suggested that the holding would apply even if the plan had been underfunded, unless the participants could show that plan mismanagement substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits.

The protection provided by the *Thole* decision for DB plan fiduciaries may be greatest where the plan in question is overfunded.

It also appears that the risk of nonpayment would need to be "imminent" to confer Article III standing. The court further indicated that even if a DB plan is mismanaged and fails, resulting in the PBGC taking it over, participants might have no standing where the PBGC fully guarantees their benefits.

It is important to note that this decision likely does not have any bearing on the recent lawsuits alleging that DB plans used outdated actuarial factors to calculate benefits. These suits allege that benefits are currently being underpaid, which is a direct individual financial loss.

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Michigan auto insurance reforms may affect group health plans

By Maureen Gammon and Anu Gogna

After July 1, 2020, Michigan drivers will no longer be required to purchase an automobile insurance policy with unlimited medical coverage for accident-related medical expenses. Employees residing in Michigan, as well as the employer-sponsored health plans that cover them, may be affected by these changes depending on how the plan is designed. Employees electing automobile insurance that no longer includes unlimited medical coverage would likely shift accident-related medical costs to the employer-sponsored health plan.

The Michigan auto insurance reforms apply to auto insurance policies issued or renewed after July 1, 2020, meaning health plans may see an increase in claim costs starting July 2, 2020.

Background

In 2019, Michigan passed **legislation** to reform its auto insurance laws. The state's current no-fault auto insurance requirement includes three parts: 1) personal injury protection (PIP), 2) property protection and residual bodily injury, and 3) property damage liability. The PIP portion of the no-fault policy pays for all reasonably necessary medical expenses with no maximum limit. Currently, a policyholder can choose auto insurance policies that have "coordinated" or "uncoordinated" benefits. If the policyholder selects coordinated coverage, then his or her health insurance, which could include employer-sponsored health coverage, would be the primary payer for accident-related medical expenses; uncoordinated coverage means that the auto insurer would cover all medical costs.

If the policyholder's health plan excludes coverage for medical expenses from auto accidents or has a coordination of benefit (COB) provision that makes the health plan a secondary payer, then the policyholder should purchase an auto policy with uncoordinated coverage in order to have full coverage for any medical expenses arising from an auto accident.

After July 1, when the Michigan auto insurance overhaul takes effect, Michigan drivers will be able to pick from the following PIP medical coverage levels, which reflect the maximum amount an auto insurance carrier will pay per person per accident for an injured person's medical expenses:

- Unlimited
- $500,000
- $250,000
- Up to $250,000 with PIP medical exclusions (anyone who is excluded will have no PIP medical coverage; exclusion is available for a named insured with non-Medicare qualified health coverage and/or for the insured's spouse or household members if they have qualified health insurance)
- $50,000 if the primary insured is covered by Medicaid while the insured's spouse and any household members are covered by Medicaid, another automobile insurance policy with PIP medical coverage or qualified health coverage
- No coverage if the primary insured has Medicare Parts A and B while the insured's spouse and household members have coverage under another automobile insurance policy with PIP medical coverage or qualified health coverage

Qualified health coverage means either of the following:

- Health and accident coverage that does not exclude or limit coverage for injuries related to auto accidents and has an annual individual deductible of $6,000 (adjusted annually beginning on July 1, 2020) or less
- Coverage under both Medicare Parts A and B

Going forward

Employers sponsoring self-insured health plans covering Michigan residents should review, and amend as they deem appropriate, the terms of their plans, including any COB provisions, regarding the health plan's liability for medical expenses arising out of auto accidents. Employers will also need to determine whether to apply those terms to all plan participants or only those participants in Michigan. Employers

After July 1...Michigan drivers will be able to pick PIP medical coverage levels.

with fully insured health plans should discuss this issue with their insurance carriers as state insurance law may limit what changes, if any, may be made to the insurance policy to address this issue.

Employers should also review their plan terms regarding subrogation and right of reimbursement, which generally allow the health plan to seek recovery from the at-fault party for medical expenses paid by the health plan.

ERISA will require the timely distribution of a new summary plan description or summary of material modifications to communicate any amendments to plan participants. Employers should also consider sending employees who reside in Michigan specific information about the upcoming changes to auto insurance policy requirements and what the health plan covers to help them make an educated decision regarding PIP coverage levels.

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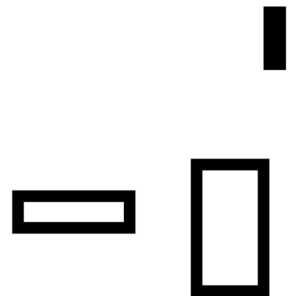


Retirement offerings in the *Fortune* 500: 1998 – 2019

By Brendan McFarland

The past two decades have seen a sweeping shift in retirement offerings from large employers, with the vast majority now providing only defined contribution (DC) and other account-based plans to newly hired employees. The shift away from traditional defined benefit (DB) to account balance plans gives today's increasingly mobile workforce more choices, flexibility and transparency, and helps employers manage the ongoing costs and risks/opportunities of providing retirement benefits.

Companies have made the transition to account-based plans in a variety of ways. Some closed or froze their traditional DB plans and then moved workers into hybrid pensions while others transitioned workers to a DC-only environment, sometimes offering a hybrid pension to some workers along the way. Many companies now have multilayered plan designs to accommodate different workforce segments, and most of these companies still manage assets and liabilities for these various plans.

Willis Towers Watson has been tracking retirement offerings from large companies for many years. This study takes a historical look at the primary retirement plans offered by current *Fortune* 500 companies between 1998 and 2019, thus showing how their retirement programs have evolved over the past 22 years. The analysis focuses on the employer's largest plan offered to newly hired salaried workers, disregarding separate plans for hourly/collectively bargained workers. Some sponsors closed or froze their primary plan but still maintain open plans for hourly or collectively bargained workers.

In 1998, 236 companies in today's *Fortune* 500 offered a traditional DB plan[1] to newly hired workers, compared with only 13 today. Nevertheless, a significant number of these sponsors still offer pension plans to newly hired workers, mostly in the form of hybrid (cash balance) plans.[2]

Highlights of the analysis include the following:

- In 2019, only 14% of *Fortune* 500 companies offered a DB plan (traditional or hybrid) to new hires, down from 59% among the same employers back in 1998.[3]

Tracking the same group of *Fortune* 500 employers since 1998 shows a dramatic decline in traditional DB offerings.

- 46% of these companies still employ workers who are actively accruing pension benefits, and 92% of those who sponsored a DB plan in 1998 still manage obligations and assets for the plans.
- There has been an uptick in plan freezes since the 2008 financial crisis among plans that were already closed to new hires. In 2008, 22% of companies that had offered a DB plan in 1998 had frozen their pensions and an additional 19% had closed their primary plan to new entrants. By 2019, 46% sponsored a frozen plan and an additional 22% had closed their primary plan.
- Additionally we have seen an uptick in plan terminations over the past decade. In 2008, 1% of sponsors that offered a DB plan in 1998 had terminated their primary plan. By 2019, this rose to 8% of sponsors.
- Almost half (49%) of pension sponsors in this analysis had a hybrid DB plan at some point, and 39% are still offering the same plan to new hires in 2019.
- Certain industry sectors, as well as employers whose pensions are relatively small (as compared with their market capitalization) and/or well funded, are more likely to offer a traditional pension plan to new hires.
- After eliminating a DB plan for new hires, most employers increase the benefits provided through the DC plan for employees not eligible for the DB plan.

Evolution of *Fortune* 500 retirement plans: 1998 – 2019

Tracking the same group of *Fortune* 500 employers since 1998 shows a dramatic decline in traditional DB offerings. Between 1998 and 2019, the percentage of employers offering traditional DB plans to newly hired workers fell from roughly half (49% of all *Fortune* 500 companies) to 3% (Figure 1, next page).

[1] A traditional DB plan benefit is based on a formula that is typically linked to pay and years of service, and is expressed as an annuity at retirement age. Traditional DB plans can provide a predictable income stream in retirement, with the value of the benefit accruals rising sharply as the participant approaches retirement age, so these plans also encourage long-term commitment.

[2] Hybrid DB plans define the benefit as an account balance rather than an annuity. Hybrid benefits typically accrue more evenly across a worker's career than traditional DB benefits (although hybrid designs can increase benefit accruals as a function of age, service or a combination of the two). When hybrid plan participants leave their employer, they usually take their account balance with them. As hybrids are DB plans, they must offer an annuity as the primary distribution option.

[3] Unless otherwise indicated, all retirement plans in this analysis are those offered to newly hired salaried workers.

Figure 1. **Retirement plan sponsorship trends, 1998 – 2019**

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total DB pension plans	285	283	281	276	274	265	250	234	213	186	172	156	142	128	116	108	96	88	84	79	74	70
Traditional DB plan	236	224	216	195	180	162	150	134	119	98	82	69	55	46	37	31	21	20	19	16	13	13
Hybrid pension plan	49	59	65	81	94	103	100	100	94	88	90	87	87	82	79	77	75	68	65	63	61	57
DC plan only	196	202	205	212	217	227	243	263	285	312	327	343	357	371	383	391	403	412	416	421	426	430

Note: Sponsorship is shown by plan type offered to salaried new hires at year-end. Trend data are shown for *Fortune* 500 companies and capture changes to their retirement plans from 1998 through June 2019.
Source: Willis Towers Watson

As discussed later in this analysis, over time, many employers have found portable, account-based retirement programs such as DC and hybrid DB plans to be a better fit for their company over traditional DB plans.

In 1998, 59% of the *Fortune* 500 offered some form of DB plan, and 41% offered only a DC plan to their newly hired workers. As is true today, DB plan sponsorship varied by industry (as discussed later in this analysis); for example, retail and high-tech industry employers tended to never offer DB plans to their workers.

Fourteen percent of *Fortune* 500 employers still offered a DB plan to salaried new hires in 2019 (Figure 2). Among DB plan sponsors, 71% offered a cash balance plan, and 18% offered a traditional final average pay plan, with remaining sponsors offering alternative DB plan designs.

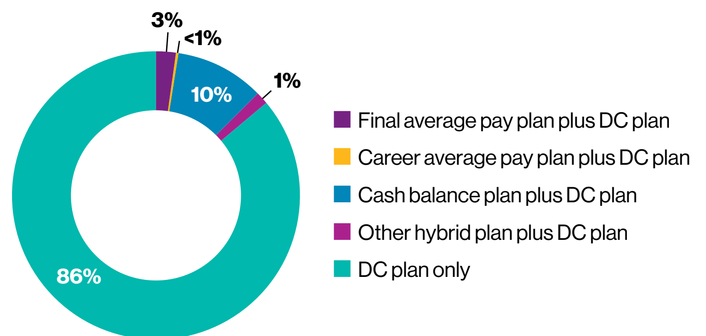
Employers followed different paths to their current retirement plan programs. Figure 3 depicts the most recent retirement action taken by these *Fortune* 500 companies.

When a sponsor freezes a DB plan, some or all of the benefits stop accruing for some or all participants; for example, a plan might stop accruing benefits linked to service but continue those linked to pay, or benefits might stop accruing for all participants younger than 50 with 15 or fewer years of service. Since 1998, 28% of *Fortune* 500 employers have frozen their primary DB plan, and another 13% have closed it. Nine percent have amended their traditional DB plan to a hybrid design and were still offering it to newly hired workers in 2019. Five percent have terminated their primary DB plan, meaning benefits were frozen and then fully settled via annuity purchases and/or lump sum payments. Nearly half (45%) have not changed their retirement plan type since 1998 (40% have offered a DC-only plan and only 5% have retained the same DB structure from 1998 to 2019).

As shown in Figure 4 (next page), employers often took more than one path to arrive at their current plan structure.

Approximately 95% of employers that sponsored a traditional DB plan in 1998 no longer offer the plan to new hires. Fifty-five percent closed, froze or terminated their primary traditional DB plan and transitioned to a DC-only environment for salaried new hires, and 40% amended the traditional DB plan to a hybrid DB design.

Figure 2. **Retirement plan types offered in 2019**



n=500
Source: Willis Towers Watson

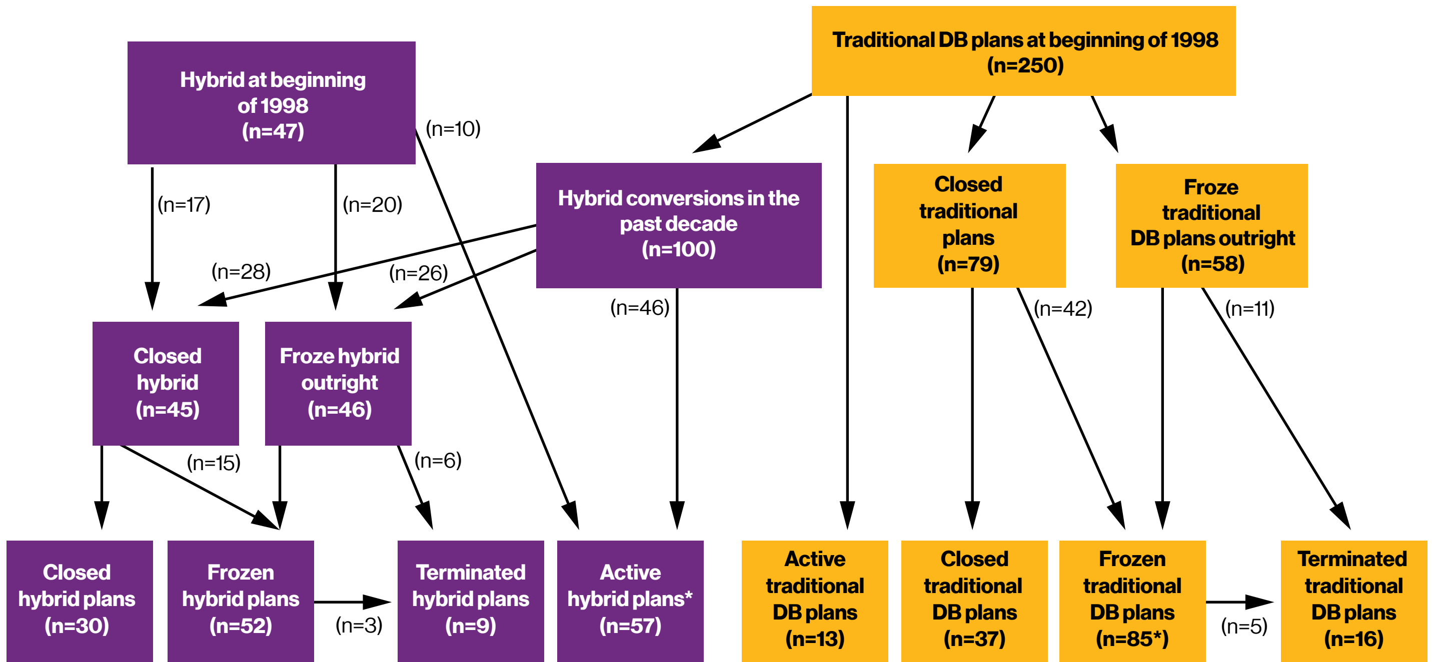
Figure 3. **Most recent changes to retirement programs since beginning of 1998**

55% of all *Fortune* 500 employers still manage pension assets and liabilities

Always DC **40%** Frozen DB **28%** Closed DB **13%**
Hybrid conversion **9%** No changes to DB (traditional or hybrid) **5%**
Terminated DB **5%**

n=500
Source: Willis Towers Watson

Figure 4. **Various paths taken by DB sponsors to arrive at 2019 offering for new hires**



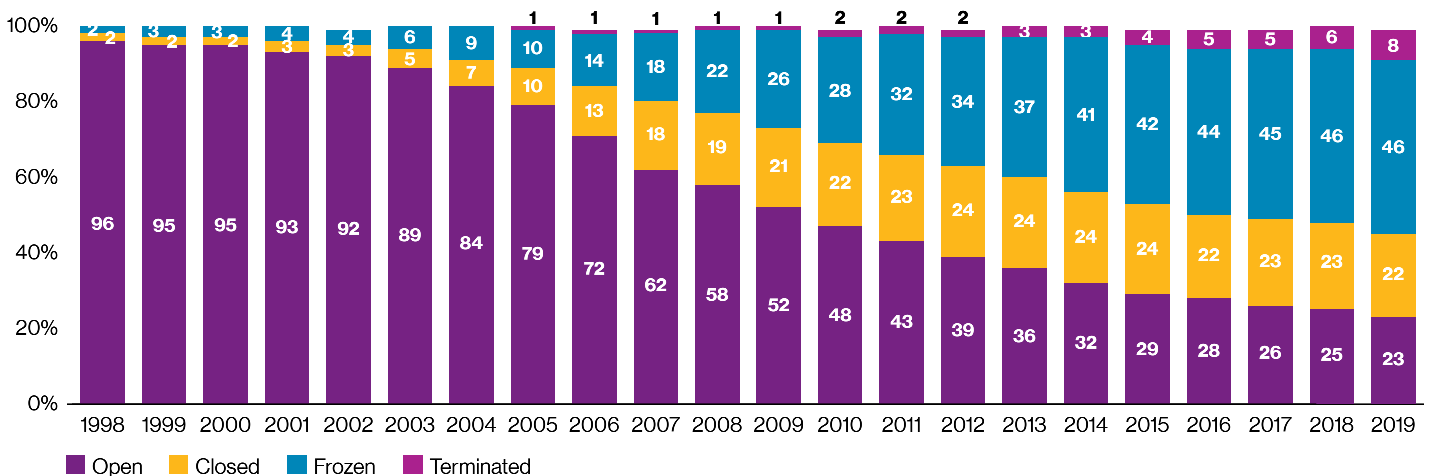
A few companies were closed or frozen prior to 1998, but are included in this analysis as they froze or terminated their DB plan since 1998.
*Includes plans that were not existent in 1998.
Source: Willis Towers Watson

The shift away from DB plans is less sweeping when hybrid sponsors are included. In 2019, 39% of *Fortune* 500 employers that had established a hybrid plan for salaried workers (or roughly half of all DB plan sponsors) still offered it to new hires.

Twenty percent of employers that offered a hybrid plan to all salaried workers in 1998 were still offering it in 2019, and 46% of employers that converted their traditional DB plan to a hybrid after 1997 still offered it to new hires.

Among *Fortune* 500 companies that offered a DB pension in 1998, the most common course of action has been to freeze the primary plan, though many sponsors took multiple steps to get there. Figure 5 depicts the evolution of open, closed, frozen and terminated pensions for all *Fortune* 500 companies that sponsored a pension in 1998.

Figure 5. **Evolution of DB plan sponsorship for *Fortune* 500 companies, 1998 – 2019**



Year	Open	Closed	Frozen	Terminated
1998	96	2	2	
1999	95	2	3	
2000	95	2	3	
2001	93	3	4	
2002	92	3	4	
2003	89	5	6	
2004	84	7	9	
2005	79	10	10	1
2006	72	13	14	1
2007	62	18	18	1
2008	58	19	22	1
2009	52	21	26	1
2010	48	22	28	2
2011	43	23	32	2
2012	39	24	34	2
2013	36	24	37	3
2014	32	24	41	3
2015	29	24	42	4
2016	28	22	44	5
2017	26	23	45	5
2018	25	23	46	6
2019	23	22	46	8

Source: Willis Towers Watson

The incidence of pension freezes rose significantly after the 2008 financial crisis. By 2014, there were more sponsors of frozen plans than of open primary plans for the first time during the 22-year analysis period. Back in 2008, 22% of plan sponsors had frozen pensions and 19% had closed their primary plan to new entrants. By 2019, 46% sponsored a frozen plan and another 22% had closed their primary plan.

Thirty-six percent of companies sponsoring frozen DB plans had closed their plans before freezing them. This pattern of first closing, then later freezing, has become more common over the past few years. In companies that froze their primary DB pension since 2014, 63% of the plans had already been closed to new entrants.

Figure 6 shows the interval between closing and freezing for DB plans that followed the close-then-freeze pattern. The average interval was 6.4 years, and the median interval was 6.0 years.

Figure 6. **Interval between DB plan closures and freezes among *Fortune* 500 companies**

	Years from close to freeze
Average	**6.4 years**
90th percentile	**12.2 years**
75th percentile	**9.0 years**
50th percentile	**6.0 years**
25th percentile	**3.0 years**
10th percentile	**1.0 year**

Source: Willis Towers Watson

Retirement plan design trends by industry

While the shift to a DC-only environment has been widespread, there are variations among sectors. Figure 7 shows the *Fortune* 500 primary plans offered to new hires by industry sector at the beginning and end of the analysis period.

A little less than half of *Fortune* 500 employers in the utilities sector still offered DB plans to newly hired employees in 2019. Utilities are typically heavily unionized and generally prefer to keep their retirement structure consistent between their union and nonunion workforces. Moreover, many jobs at utilities companies are physically demanding, and DB plans facilitate retirement at an appropriate time.

Figure 7. **Plans offered to new hires by industry (sorted by open DB plan prevalence) in 1998 versus 2019**

Industry (number of companies)	1998			2019			1998 – 2019
	Traditional DB plus DC	Hybrid plus DC	DC only	Traditional DB plus DC	Hybrid plus DC	DC only	Growth in DC-only sponsorship
Utilities (26)	71%	9%	20%	0%	46%	54%	34%
Insurance (41)	83%	5%	12%	7%	32%	61%	49%
Pharmaceuticals (13)	62%	0%	38%	23%	15%	62%	24%
Oil and gas (32)	55%	7%	38%	3%	31%	66%	28%
Chemicals (16)	62%	19%	19%	0%	19%	81%	62%
Finance (42)	58%	15%	27%	5%	12%	83%	56%
Transportation (19)	65%	6%	29%	5%	11%	84%	55%
Manufacturing (40)	67%	8%	25%	5%	10%	85%	60%
Food and beverage (20)	75%	20%	5%	0%	15%	85%	80%
Wholesale (31)	31%	10%	59%	0%	6%	94%	35%
Automobiles and transportation equipment (14)	75%	8%	17%	4%	0%	96%	79%
Retail (63)	21%	5%	74%	0%	2%	98%	24%
Health care (15)	0%	20%	80%	0%	0%	100%	20%
High technology (40)	48%	10%	42%	0%	0%	100%	58%
Communications (19)	61%	6%	33%	0%	0%	100%	67%
Services (35)	9%	19%	72%	0%	0%	100%	28%
Property and construction (14)	8%	0%	92%	0%	0%	100%	8%

Source: Willis Towers Watson

While hybrid plans are the most prevalent DB offering, some pharmaceutical companies still offer traditional DB plans to most salaried new hires. This sector and the insurance sector sponsor almost half (46%) of all traditional DB plans offered to new hires today. Insurance-sector employees may be more likely than other workers to understand and appreciate DB plans, hence their higher rate of DB offerings (both traditional and hybrid) relative to many other sectors. Additionally the oil and gas sector also has a relatively high pension sponsorship rate, albeit in the form of hybrid DB plans.

The services and retail sectors have had low DB sponsorship rates historically, and DC plans are probably a better fit for them (e.g., their relatively high turnover makes portability more important).[4]

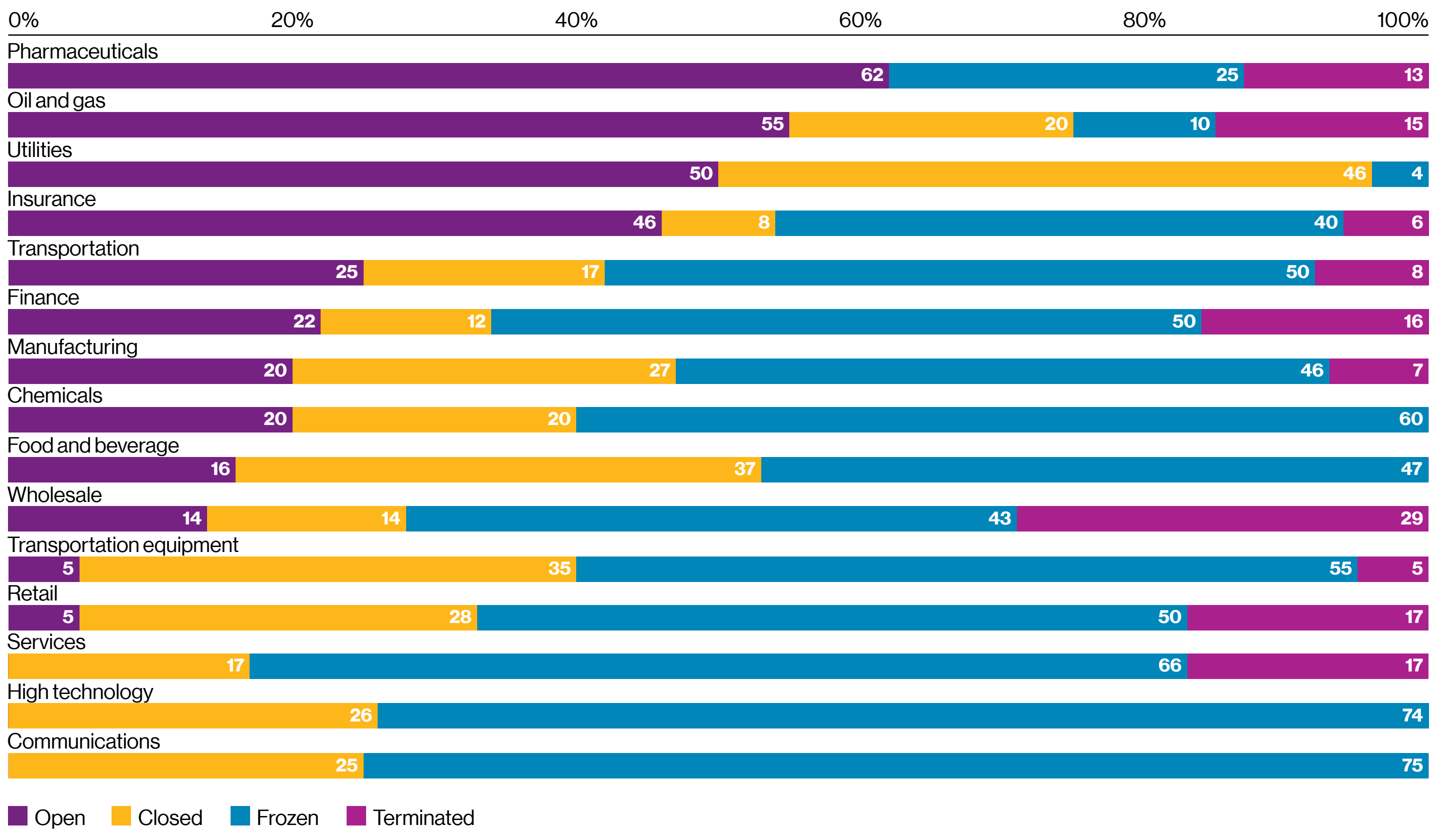
Economic conditions and workforce demographics affect plan design trends. Between 1998 and 2019, the most striking upticks in DC-only sponsorship were in the food and beverage, automobiles and transportation equipment, chemicals, communications, finance, high-tech, manufacturing and transportation industries – 55% in transportation and 80% in food and beverage, with the others falling in between. The food and beverage industry and communications industry have also had significant shifts (over 35%) from DB to DC-only since the 2008 financial crisis (not shown in the figures).

Economic conditions and workforce demographics affect plan design trends.

Looking only at companies that offered a DB pension at some point, most sectors – with the exceptions of food and beverage, manufacturing, energy/natural resources, pharmaceuticals and utilities – now have more frozen than closed plans (Figure 8). At least 50% of the companies in which some workers are still accruing pensions are in the food and beverage, oil and gas, pharmaceuticals, utilities and insurance sectors.

[4] See "Median years of tenure with current employer for employed wage and salary workers by industry, selected years, 2008-2018," Table 5, Economic News Release, U.S. Bureau of Labor Statistics, at **www.bls.gov/news.release/tenure.t05.htm**.

Figure 8. **Current status of *Fortune* 500 DB plans by industry**



Source: Willis Towers Watson

DB plan sponsorship by relative plan size

There is a relationship between relative plan size – projected benefit obligation (PBO)[5] over market capitalization – and pension changes. Figure 9 shows pension size at fiscal year-end (FYE) 2018 by the most recent change to the primary DB plan.

On a median basis, open DB plans were slightly smaller relative to a company's market capitalization than frozen and closed plans. The difference was even more pronounced on an average basis, mostly because employers with very large plans were more likely to close or freeze their primary DB plan. Many hybrid plans had a much lower PBO-to-market-cap ratio because lump sum distributions are prevalent among these plans.

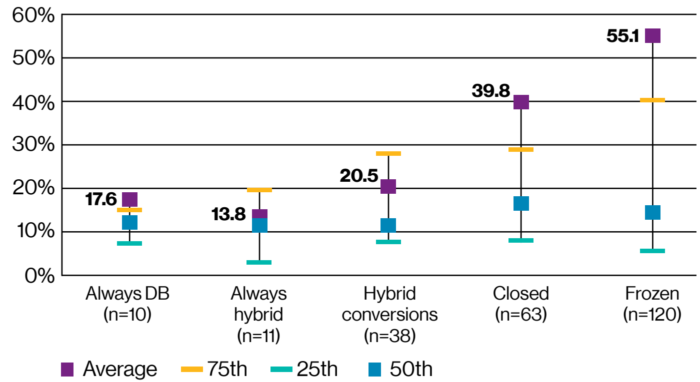
Figure 10 depicts 2019 plan status for all DB plan sponsors in the *Fortune* 500 – open, closed or frozen – broken out by pension size. Almost every company whose DB plan obligation was more than 50% of the firm's value has switched to a DC-plan-only environment.

Forty percent of employers whose DB plans were between 5% and 9% of their firm value still offered the plan to salaried new hires in 2019. These employers' relatively low pension risk/opportunity might be one reason for keeping their primary DB plan open. On the other hand, only 15% of plans whose obligations were less than 5% of the company's market capitalization remained open to new hires in 2019. The finance sector includes many employers with small plans relative to firm value but has one of the highest growth rates in DC-only sponsorship.

Plan sponsorship also varies with the plan's funding deficit/surplus relative to the sponsor's market capitalization. A plan might have both large obligations relative to the value of its sponsor and manageable funding levels or even a surplus. Figure 11 depicts the relationship between relative funding deficits/surpluses and status of the primary DB plan. Plans with significant deficits relative to the sponsor's market capitalization are more likely to be closed or frozen than those with smaller deficits and surpluses.

[5] A pension's projected benefit obligation (PBO) is an actuarial liability equal to the present value of liabilities earned and the present value of liability from future compensation increases.

Figure 9. **Average plan size at FYE 2018 by last retirement plan action taken**



Note: Entries are shown for companies whose financial data were readily available.
Source: Willis Towers Watson

Figure 10. **Retirement plan status during 2019 based on relative plan size at FYE 2018**

Size (PBO/market capitalization)	2019 DB plan plus DC plan	2019 DC only (once DB for new hires)
100% or greater	**7%**	**93%**
50% to 99%	**4%**	**96%**
30% to 49%	**27%**	**73%**
20% to 29%	**25%**	**75%**
10% to 19%	**31%**	**69%**
5% to 9%	**40%**	**60%**
Less than 5%	**15%**	**85%**

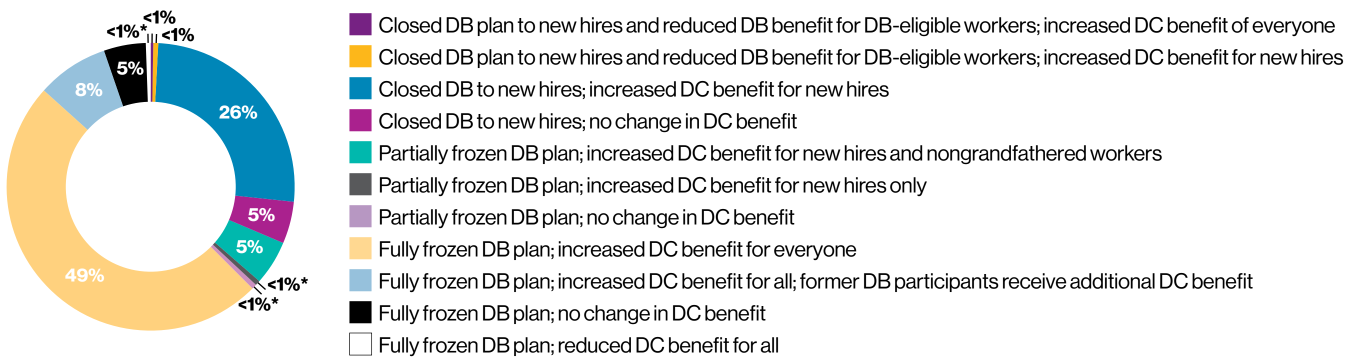
Note: Entries are shown for companies whose financial data were readily available.
Source: Willis Towers Watson

Figure 11. **Retirement plan status in 2019 based on funding deficits/surplus over market capitalization at FYE 2018**

Pension deficit/surplus over market capitalization	2019 DB plan plus DC plan	2019 DC only (once DB for new hires)
10% or greater	**10%**	**90%**
5.0% to 9.9%	**13%**	**87%**
3.0% to 4.9%	**31%**	**69%**
1.0% to 2.9%	**31%**	**69%**
0% to 0.9%	**25%**	**75%**
Surplus	**28%**	**72%**

Note: Entries are shown for companies whose financial data were readily available.
Source: Willis Towers Watson

Figure 12. **Transition approaches in moving from DB to DC-only environment**



Note: Results are shown where transition data were available.
*Less than 1%; chart does not sum to 100% due to rounding.
Source: Willis Towers Watson

Transitioning workers from a DB plan to a DC plan

Most employers follow one of three broad paths to a DC-only environment. The first is to close the primary DB plan to new hires. The second approach is a partial plan freeze, in which only participants who meet certain age and/or service requirements continue accruing benefits. All other participants are switched to the primary retirement plan offered to salaried new hires. The third approach is a complete freeze, where the plan stops all accruals, and all participants are moved to the retirement program offered to new hires.

Of employers that adopted a DC-only approach since 1998 and still manage pension obligations, 31% closed the primary DB plan, 6% partially froze the primary DB plan,[6] and the remaining 63% froze the primary plan completely by 2019. If an employer implemented one transition approach and later changed it, these results for the purpose of this analysis capture the latest status of the plan.

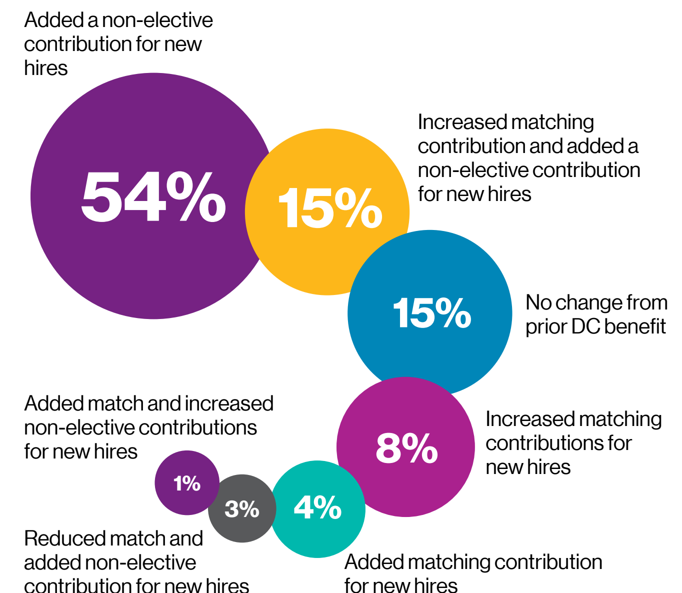
As shown in Figure 12, employers varied the details within the three broad transition approaches. The most frequent approach (49%) was freezing the primary DB plan completely and enhancing benefits in the DC plan for all workers. The next most common practice (26%) was keeping the primary DB plan open for current participants and increasing DC benefits for newly hired workers. Eight percent of employers froze the primary DB plan completely, enhanced DC benefits for everyone and gave former DB plan participants a larger DC benefit than new hires.

[6] Of the companies that partially froze their DB plans, all but one were traditional DB plans before the change.

Changes made to DC plans after eliminating the DB formula

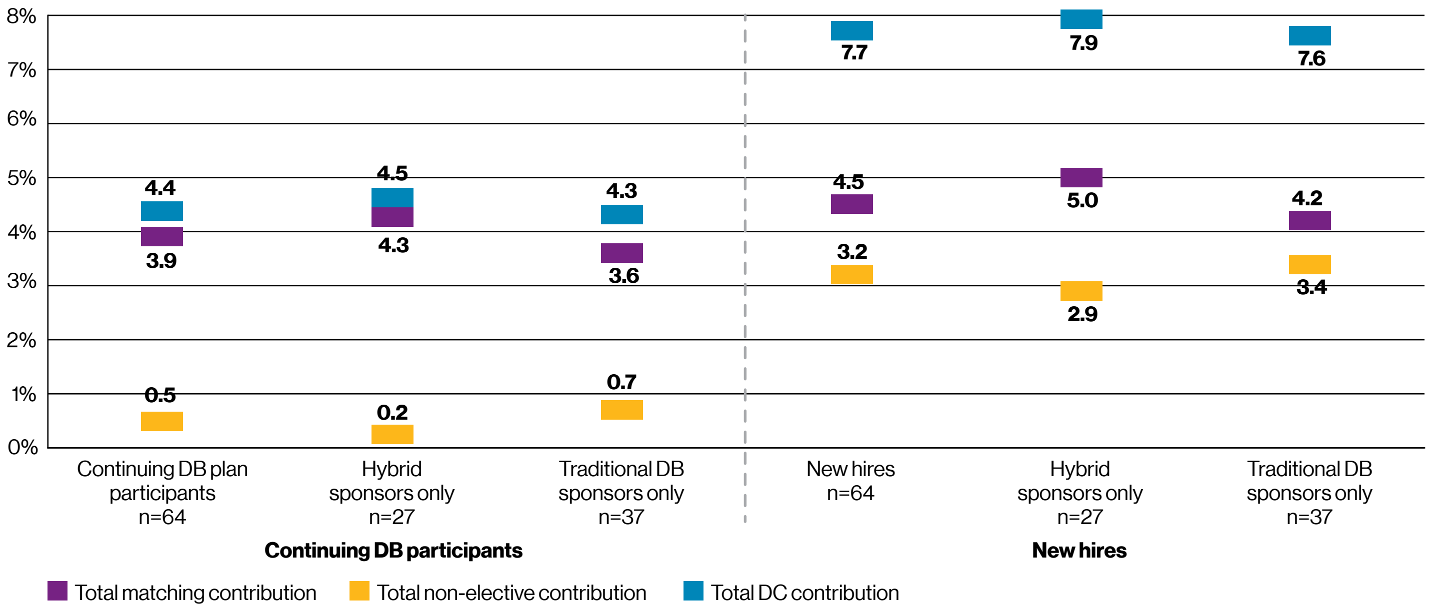
Almost all employers that closed their primary DB plan increased benefits in the DC plan for salaried new hires. As shown in Figure 13, the most prevalent approach (54%) was to add a nonmatching contribution to the DC plan, meaning the employer contributes even if the employee does not. Fifteen percent of employers increased the match for newly hired employees and added a nonmatching component to their plan design.

Figure 13. **Changes to DC plans in companies that closed their DB plans**



n=67
Note: Results are shown where transition data were available.
Source: Willis Towers Watson

Figure 14. **Employer contributions to DC plans at companies that closed their primary DB plan (% of pay)**



Note: Results are shown where transition data were available.
Source: Willis Towers Watson

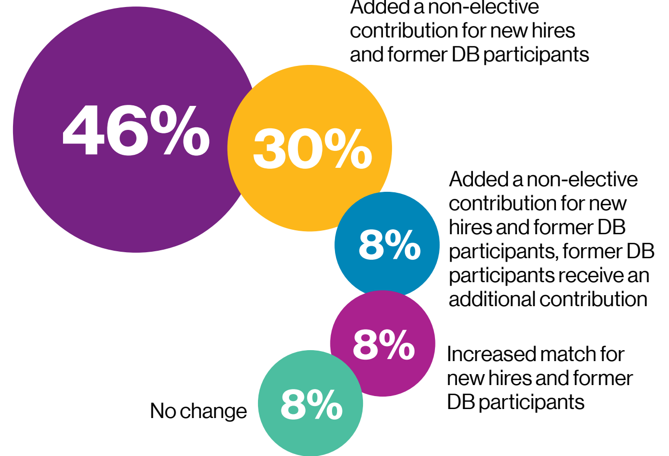
Because non-pension-eligible workers received higher DC benefits than DB plan participants, we next quantify DC contributions as a percentage of pay for these two groups of workers. Figure 14 shows total DC employer contributions for two 35-year-old employees earning $50,000 per year: one a new hire and the other a continuing DB plan participant with five years of service.

Total employer contributions to DC plans for new hires were an average of 3.3% of compensation higher than contributions for their pension-eligible counterparts. Most of the increase reflects higher non-matching contributions for new hires (which generally would not fully replace the pension loss).[7]

We next analyze changes to the DC plan when the sponsor partially froze the primary DB plan, meaning some workers remained pension-eligible while others were moved into the DC-only program. As shown in Figure 15, the most prevalent action (46%) was to increase the employer match and add a non-elective contribution for new hires and former DB participants. The second most popular transition strategy was to add a non-elective contribution in the DC plan for new hires and former DB participants (30%).

[7] See "**Shifts in benefit allocations among U.S. employers**," *Insider*, July 2017.

Figure 15. **Changes to DC plan in companies that partially froze their primary DB plans**



n=13
Note: Results are shown where transition data were available.
Source: Willis Towers Watson

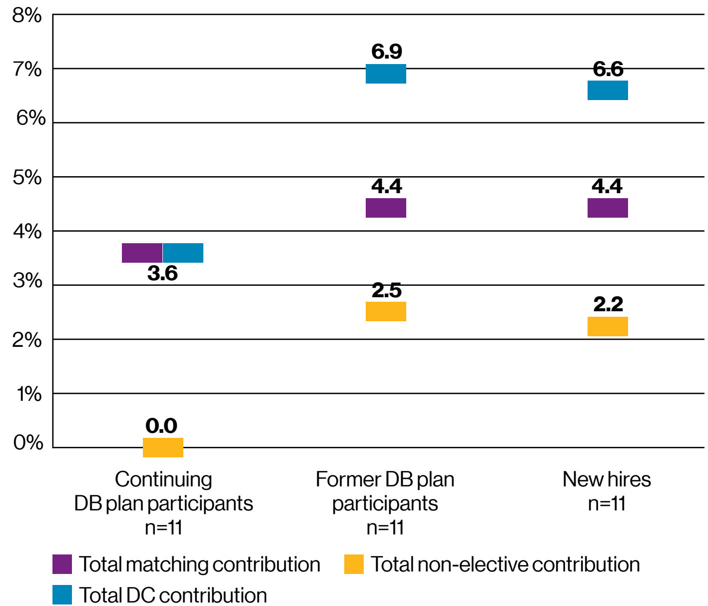
The most prevalent action (46%) was to increase the employer match and add a non-elective contribution for new hires and former DB participants.

Figure 16 quantifies DC benefits as a percentage of pay for employers that partially froze their primary DB plans. Employers contributed more to DC accounts for former DB plan participants and new hires than to the accounts of those who remained DB plan-eligible, by roughly 3.3% and 3.0% of compensation, respectively. Among these employers, on average, the additional benefit for former DB plan participants and new hires was distributed fairly evenly between the match and non-match. All but one of the employers that partially froze their primary DB plan had provided a traditional plan before moving to a DC-only environment for new hires and some formerly pension-eligible workers.

We next analyze what happened to DC plans when the sponsor moved all employees to a DC-only program (Figure 17).

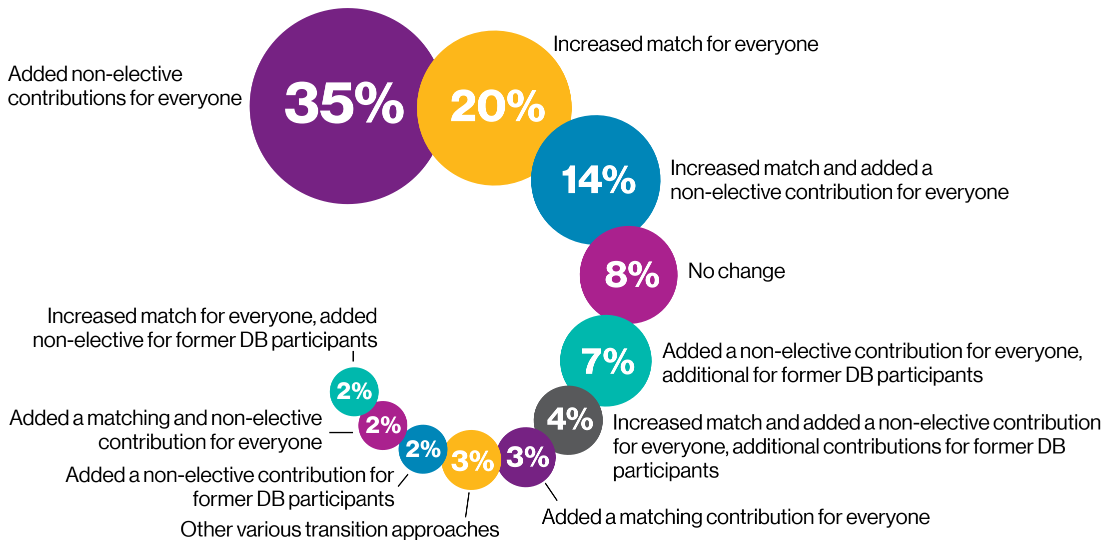
After a full pension freeze, the majority of employers either added a nonmatching contribution to the DC plan, increased the current match or some combination of the two. In 17% of companies that completely froze their primary DB plans, former DB plan participants received larger DC contributions than those who were never enrolled.

Figure 16. **Employer contributions to DC plans at companies that partially froze their primary DB plans (% of pay)**



Note: Results are shown where transition data were available.
Source: Willis Towers Watson

Figure 17. **Changes to DC plans in companies that fully froze their primary DB plans**



n=133
Note: Results are shown where transition data were available.
Source: Willis Towers Watson

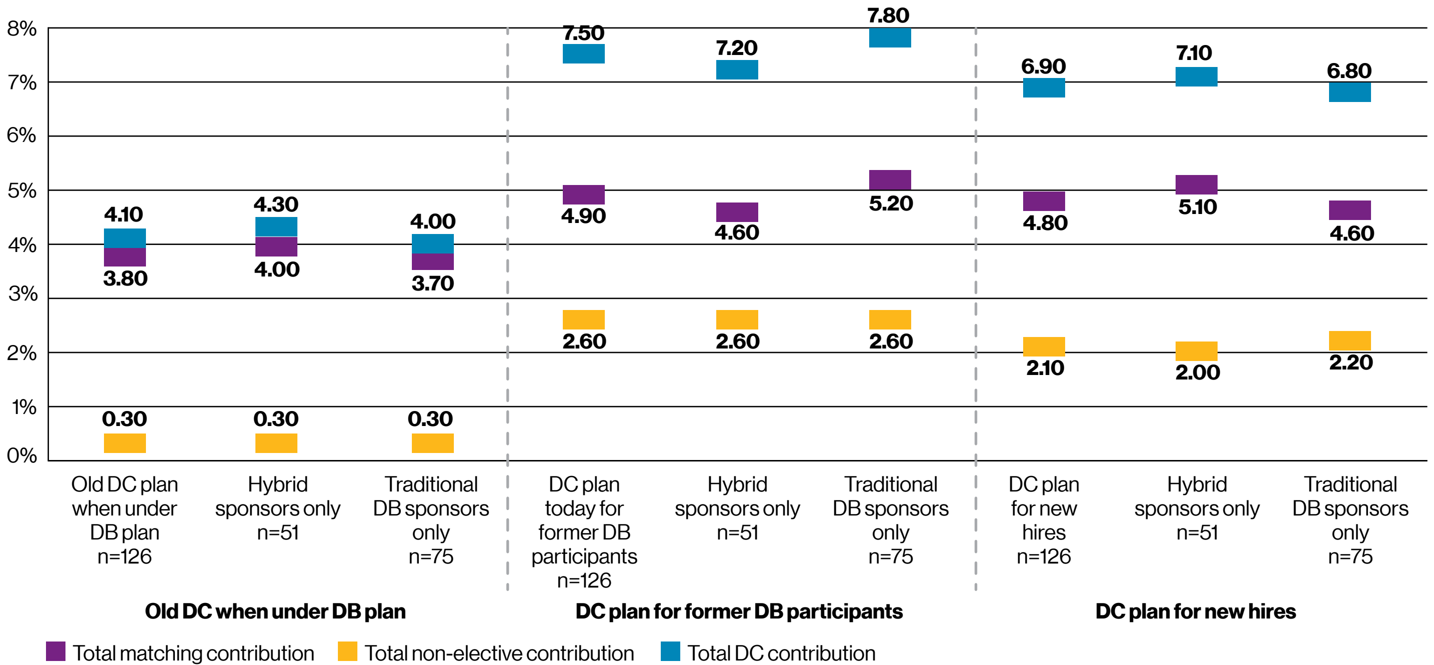
Figure 18 shows average DC employer contributions for former DB plan participants and new hires, as well as what the DC plan used to yield before the primary DB plan was fully frozen.

In transitioning from the original DC to the enhanced DC plan, former DB participants gained an average 3.4% of pay in their DC plan. The difference between new hires and former DB participants was roughly 0.6% of pay, most of which derived from nonmatching contributions.

Plan terminations

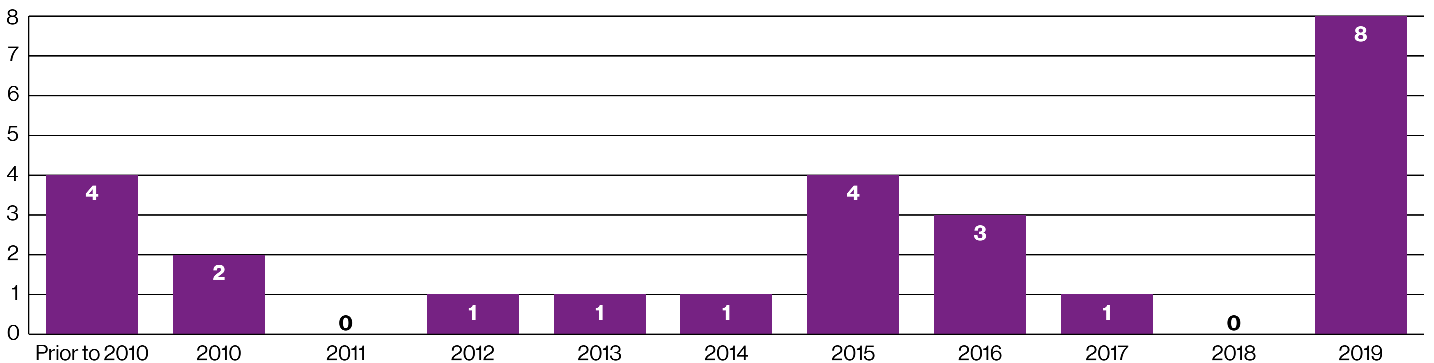
As companies continue looking for ways to alleviate their pension foothold, an increasing number of *Fortune* 500 companies have terminated their primary pension plan. Among companies that maintained a pension plan in 1998, 25 (or 8%) have since terminated their primary plan, meaning benefits were frozen and then fully settled via annuity purchases and/or lump sum payments. As shown in Figure 19, roughly a third of companies that terminated their plan did so in 2019.

Figure 18. **Employer contributions to DC plans at companies that fully froze their primary DB plans (% of pay)**



Note: Results are shown where transition data were available.
Source: Willis Towers Watson

Figure 19. **Year of plan terminations by *Fortune* 500 companies, 1998 – 2019**



Source: Willis Towers Watson

In most cases, companies first froze their plan and then terminated it at a much later date. Among companies in this analysis that terminated, the average time between a company fully freezing and then terminating its main DB plan was 6.7 years.

Transitioning workers from a traditional DB plan to a hybrid plan

In 2019, roughly 81% of active pension sponsors in the *Fortune* 500 offered a hybrid pension (or 11% of all *Fortune* 500 companies), and around 82% of them (47 of 57) had a traditional DB plan in 1998. Figure 20 depicts the timing of these DB-to-hybrid-plan conversions.

In the earlier years of the analysis, employers were converting traditional pensions to hybrids at a steady pace: Less than half (45%) of these conversions were before 2004. There was a lull between 2004 and 2006, most likely due to the legal and regulatory uncertainty about whether these plans were age discriminatory. After later court rulings and the Pension Protection Act of 2006 (PPA) resolved the issue, conversions picked up again but have slowed over the past few years.

Employers that converted their traditional DB plans to hybrids after 1998 (and still offered them in 2019) used various methods to transition workers into the new hybrid formula.

[T]he average time between a company fully freezing and then terminating its main DB plan was 6.7 years.

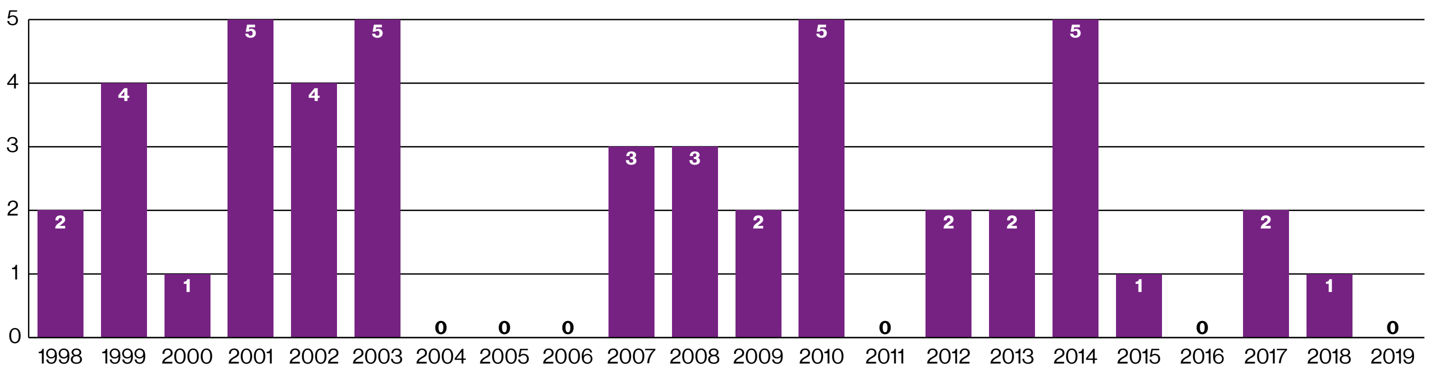
Twenty-six percent of employers kept current workers in the traditional DB plan and enrolled new hires in the hybrid plan. An additional 26% allowed employees to choose between the traditional pension plan and the hybrid plan. Four percent kept workers who met specific age and/or service criteria in the traditional plan and shifted other workers into the hybrid plan.

Thirty-four percent of these active hybrid sponsors froze traditional accruals and moved all workers to the hybrid plan. Among this group, three-fourths used an A + B approach, where A represents the frozen traditional pension benefit and B represents the accruing hybrid balance. The other one-fourth froze the traditional DB plan and converted the pension accruals into opening account balances.[8]

The remaining employers offered employees upon retirement either the benefit of the former DB plan or the benefit of the hybrid plan, whichever was greater.

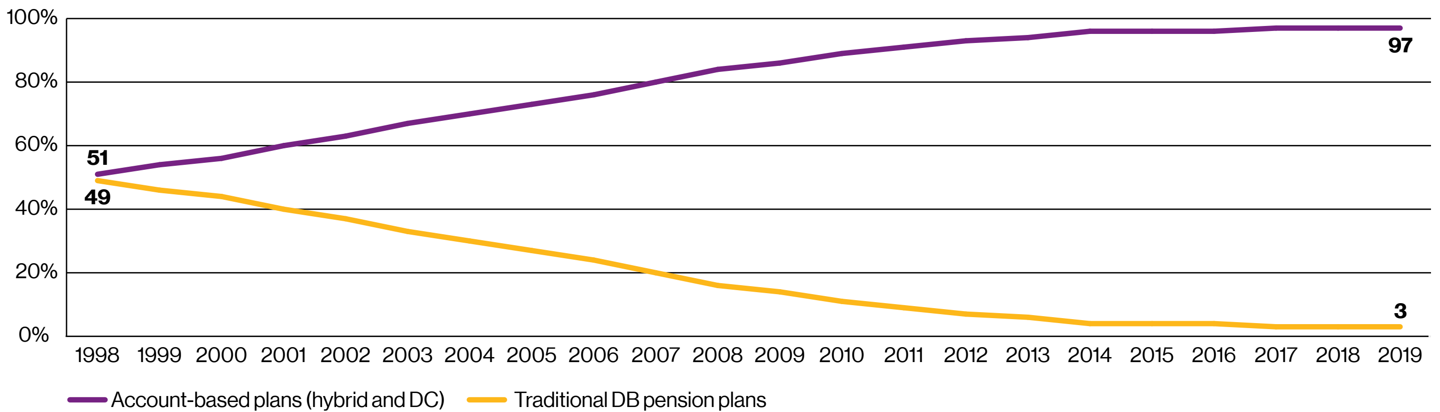
[8] The vast majority used this implementation approach before the PPA.

Figure 20. **Hybrid conversions, 1998 – 2019**



n=47
Note: Results are shown only for open hybrid plans in 2019.
Source: Willis Towers Watson

Figure 21. **Traditional DB pensions versus account-based plans, 1998 – 2019**



n=500
Source: Willis Towers Watson

An account balance world

In 2019, 97% of *Fortune* 500 employers offered only account-based plans as the primary retirement vehicle to newly hired salaried employees (Figure 21).

We next analyze the annual percentage of pay employers allocate to their primary account-based plans. Figure 22 shows retirement (DB plus DC) allocations from *Fortune* 500 sponsors to account-based plans belonging to 35-year-old newly hired employees earning $50,000 per year.

On average, an employee received retirement benefits worth 9.7% of pay at a company with a hybrid plan and DC plan versus 6.0% of pay at a DC-only company. Among DC-only companies, employer contributions varied significantly, from an average 4.9% at companies that were always DC-only to 7.0% at companies that once sponsored a pension (DB or hybrid).

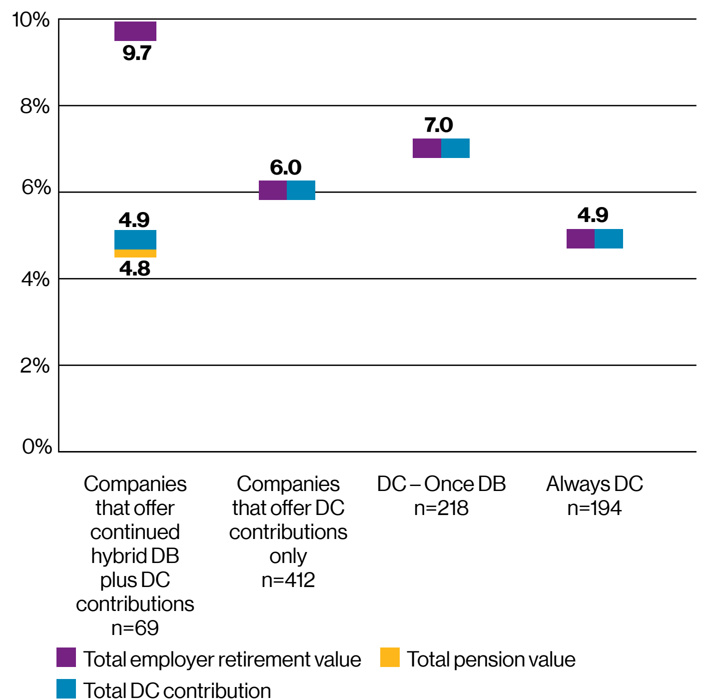
The different allocations shown in Figure 23 (next page) between employers that were always DC-only and those that used to have open DB plans arise from companies eliminating their primary DB plans and then boosting the match, adding a nonmatching contribution or both, as discussed earlier in the analysis.

Figure 24 (next page) shows retirement allocations as a percentage of pay for various industry sectors,[9] and the level of benefits varies widely. Retirement benefits tend to be more generous in the oil and gas, chemicals, pharmaceuticals and utility industries.

[9] Allocations are shown for industries with more than 10 observations.

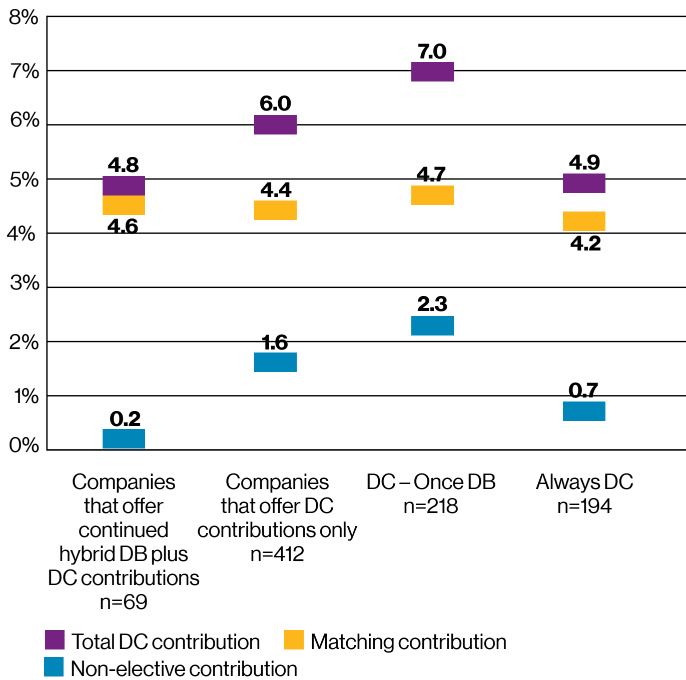
In 2019, 97% of *Fortune* 500 employers offered only account-based plans as the primary retirement vehicle to newly hired salaried employees.

Figure 22. **Annual allocations to account-based plans for new hires (% of pay)**



Note: Results are shown where complete contribution data were available. If discretionary contributions were shown in ranges, the maximum value was used. Employees are assumed to contribute enough to receive the maximum matching contribution. Pension value is based on cash balance pay credits. The 13 traditional DB plan sponsors are excluded.
Source: Willis Towers Watson

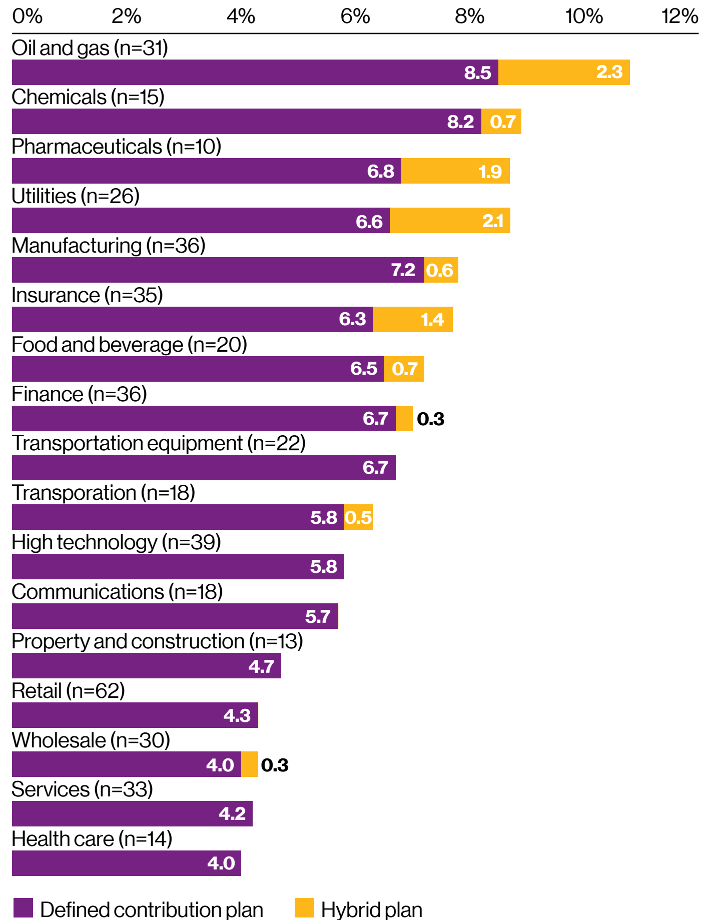
Figure 23. **Annual contributions to defined contribution plans for new hires (% of pay)**



Note: Results are shown where complete contribution data were available. If discretionary contributions were shown in ranges, the maximum value was used. The data assume employees make the contributions necessary to receive the maximum matching contribution and exclude 13 traditional DB plan sponsors.

Source: Willis Towers Watson

Figure 24. **Annual contributions to account-based plans for new hires by industry**



Note: Results are shown where complete contribution data were available. If discretionary contributions were shown in ranges, the maximum value was used. The data assume employees make the contributions necessary to receive the maximum matching contribution. Pension value is based on cash balance pay credits. Data exclude 13 traditional DB plan sponsors.

Source: Willis Towers Watson

Conclusion

As part of the ongoing shift to account-based plans, some employers have been paring back overall spending on retirement benefits, as well as spreading the benefits more evenly across an employee's career. Account-based plans also shift more responsibility for retirement needs to employees, which creates its own challenges/opportunities for both sponsors and workers.

The shift from traditional DB pension plans to account-based DB plans or a DC-only environment is well established. Nevertheless, *Fortune* 500 employers still offer DB pension plans to new hires, albeit in a hybrid form, and many companies with pensions are continuing to accrue benefits for various workers, as well as administering the plans, and managing plan assets and obligations. The transition to account-balance plans presents new opportunities and challenges for both employers and employees in terms of workforce/risk management and retirement security.

To help employees manage the additional responsibility, many employers are making financial best practices a core piece of their overall wellbeing strategy. Some have expanded their wellness programs to include supports such as debt management and budget counseling, incorporating new technologies to create an engaging and rewarding user experience. Failing to address workers' concerns about their finances and retirement security could become a drag on productivity, ultimately harming an employer's bottom line.

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