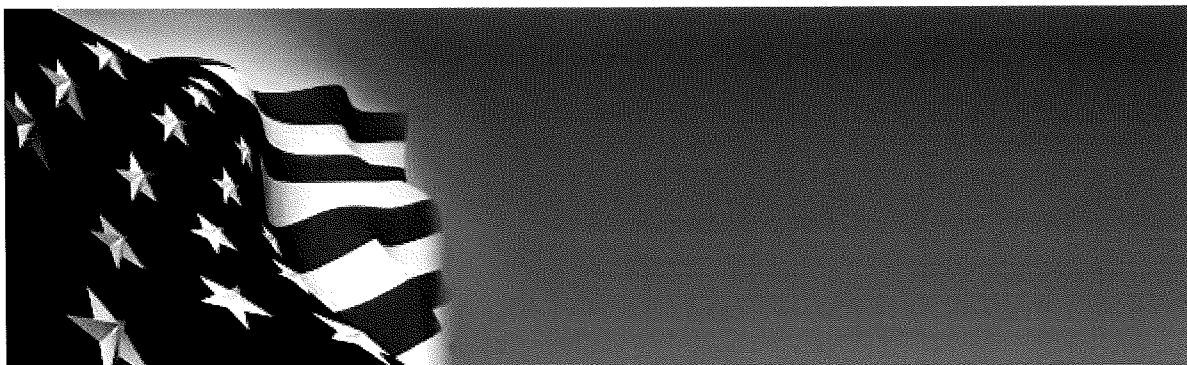


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CYPEN & CYPEN NEWSLETTER for SEPTEMBER 4, 2014

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

1. ERISA HITS THE BIG 4-0: A well written article from workforce.com recognizes how the Employee Retirement Income Security Act of 1974 has evolved over the past four decades. Flexibility is what founding law of retirement plans, ERISA, has been attempting to accomplish since it was passed forty years ago under the Ford administration. Despite missteps, the original law and subsequent rulings have helped the industry develop, allowing millions of U.S. workers to participate in and benefit from a regulated retirement system. In 2011, U.S. Labor Department statistics show 683,647 retirement plans in America compared with 311,094 in 1975. It was Labor Day -- Sept. 2, 1974 -- when President Gerald Ford signed ERISA into law. For the past 40 years, employers who offer retirement plans have had to promise workers certain rights and protections. ERISA's intent was to secure U.S. workers' retirement money. It set standards for coverage, meaning who was able to participate; vesting, or how long people needed to work before getting benefits; and minimum funding. Now employers or plan sponsors

have to make decisions that are in the best interests of their participants. Before the law, companies with pension plans could use money set aside for benefits for other purposes. Companies could also close an underfunded plan without owing participants any money. The turning point for federal oversight happened when Studebaker-Packard Corp. closed its South Bend, Indiana, plant in 1963. The company had an underfunded pension plan, thousands of workers walked out with less than 15% of their retirement benefit, and some got nothing at all. Something had to be done: it was a legendary company that everybody knew, and it failed. For the first few years after ERISA's passage, the number of defined benefit plans grew, and by 1980, nearly 36 million private sector workers, or 46% of the private sector workforce, was covered by a DB plan. With DB plans, employers define the benefit based on a predetermined formula. The employer funds and invests the money, and the payout is typically an annuity. In the 1980s, Congress and the Reagan administration adjusted funding rules for over- and underfunded plans, as well as changed the premium structure for the insurance agency, the Pension Benefit Guaranty Corp., which was set up to backstop defined benefit plans. Tightening funding rules meant fewer tax free dollars in pension plans and more taxable dollars in the economy. Translation: while Congress was able to give Americans tax breaks on their income, new laws gave plan sponsors no incentive to prepare for hard times. In the 1980s and early '90s, Congress discouraged the very purpose of the law, which was to have benefits funded. Plan sponsors were caught in this calamity and said "no way," and so they started closing plans. In 1983, there were 175,143 defined benefit plans. By 1992, there were only 88,621. In 2011, that number shrank to 45,256. Congress may have received short-term tax value, but it really essentially destroyed the DB system. The ability to have a secure retirement is much more tenuous today than it was 30 years ago. Plus, the U.S. workforce was changing. A more mobile workforce was evolving, and the years it took to qualify for traditional benefits did not suit many employees. Statistics show that workers born between 1957 and 1964 have held an average of 11 jobs during their prime working years! Employers started realizing they did not want to take on all the responsibility of a pension plan, but still wanted to offer a tax deferred retirement savings plan. It was not until 1981, when the U.S. Internal Revenue Service's regulation under Section 401(k) made it clear that portions of workers' regular salaries could be contributed to

secondary savings plans on a tax deferred basis. Popularity of the employer-sponsored but employee-funded 401(k) (defined contribution plan) took off. The number of defined contribution plans more than doubled in a decade's time, to 599,245 in 1990, from 340,805 taxable plans in 1980. The shift was put into motion. It was overregulation, but it continued the effects of policymakers using tax-preferred pension funds as a source of revenue, but it was also a trend that reflected a dramatically changing workforce, as well as all the positive aspects of a vibrant DC system. The employees seemed to like the plans. By 2000, 51 million people participated in DC plans, compared with the 22 million who took part in a defined benefit plan. There were 687,000 defined contribution plans with \$2.9 trillion in assets, compared with 49,000 defined benefit plans with \$2 trillion in assets. Since 1985, more contributions have flowed into defined contribution plans on an annual basis than DBs. As DC plans grew and became the main way people save for retirement, the industry has tried to put defined benefit aspects into 401(k) plans. The typical 401(k) plan in the '90s had workers signing up, looking at prospectuses and deciding how much and where to invest. In many ways, workers were expected to be professional money managers, and there was concern and evidence that they were not doing too well. (Surprise.) In 2006, Congress passed the Pension Protection Act. The law helped plan sponsors automate a lot of the decisions for workers, making it easier to save. It also cleared up rules on the DB side for companies to set up cash balance plans. It was a recognition that most people were going to be saving through defined contribution. Half of plans surveyed in 2013 automatically enroll participants; of that group, 87% automatically bump worker contributions annually. As of December 2013, DC plans held \$5.9 trillion in assets, dwarfing the \$3 trillion defined benefit market. Even though there are \$23 trillion in total retirement assets today, many wonder whether America has saved enough money to last through retirement. (Fat chance.) There are forces in play that seem to be repeating the past mistakes discouraging Americans to save as much as possible. (Curiously, last year, the President proposed to limit the amount workers could save from all types of retirement accounts.) Just look back in the past to see what happens when Congress tinkers with tax benefits of retirement plans. Here is the bottom line: either we have to start paying for services or reduce what we spend, and quit robbing future retirees of their ability to save.

2. ERISA -- SO MUCH FOR RETIREMENT SECURITY:

Huffingtonpost.com says enactment of the Employee Retirement Income Security Act on September 2, 1974 was inspired by the 1963 collapse of the Studebaker Corporation, whose pension was so poorly funded that even workers with 10 years of service got a tiny pension and about a third of the workers got nothing. The bill was sponsored by the late Senator Jacob Javits, a gutsy liberal Republican from New York, who also supported banning segregation in housing projects, along with supporting the Civil Rights Act and the rights of labor unions. Upon the passage of ERISA, Javits said that Congress has made an auspicious beginning with the enactment of the pension reform bill, but there still remains a great deal to do to promote a more satisfactory private retirement system -- one that will enable every American, after his productive years, to look forward to a retirement with freedom from anxiety and from economic want. Unfortunately, many companies, from Northwest Airlines to General Motors, decided deliberately to underfund the pension programs and spent the money. Where was the leadership on this travesty? Not only did companies decide to break their pension promises, but get rid of the plans altogether. From 1974 to 2004 the percentage of Americans covered by a pension shrank from 44% to 17%. Instead, companies set up 401 (k) plans, which were never intended to be a retirement plan, but a supplement to an existing pension -- the typical employer contribution rate is equal to 3% of pay versus 8% of payroll for a regular pension. As a result, retirement is a catastrophe. According to the Federal Reserve Board, the median amount saved for those age 55 to 64 was \$100,000 in 2010 -- or a measly annual income of \$4,000, or about \$77 a week. The U.S. has one of the least generous pension systems in the advanced world; only six member countries of the OECD have lower pension wealth! What makes these empty nest eggs even scarier is that more Americans have bigger bills than their parents did. More than 50% of Baby Boomers between the ages of 55 and 65 were making mortgage payments in 2007 -- on average owing more than \$140,000. That amount is nearly three times what was owed by that age group a mere 18 years earlier, when only 34% were making mortgage payments. (Many years ago, an experienced pension lawyer told us what ERISA really stood for: "Every Ridiculous Idea Since Adam." We never forgot it.)

3. ONE LAST ERISA ITEM: From benefitnews.com here is a look at 11 important milestones, modifications and case law in ERISA's 40-year history:

- ERISA is signed in 1974. On Sept. 2, 1974, President Gerald R. Ford signed the Employee Retirement Income Security Act into law. He surmised that the landmark measure would "finally give the American worker solid protection in his pension plan."
- PBGC is established. The administration of ERISA falls under the U.S. Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation. Currently, the PBGC protects the retirement incomes for more than 44 million American workers.
- EBSA oversight. The Employee Benefits Security Administration, which has held prior names, is charged with administering and enforcing requirements of Title I under ERISA.
- Retirement Equity Act of 1984. This modification to ERISA helped to reduce the maximum age an employer may require for participation in a retirement plan, extended the period a participant could be absent from work without losing credit and created spousal rights for retirement benefits.
- Omnibus Budget Reconciliation Act of 1986. This piece of legislation stopped employers from limiting participation in their retirement plans for new employees who were approaching retirement age.
- Omnibus Budget Reconciliation Act of 1989. This legislation added provisions that allow the Secretary of Labor to assess a penalty, up to 20% of any amount recovered, for fiduciary violations.
- Pension Protection Act of 2006. The PPA changed ERISA by expanding fiduciary investment advice options to participants in 401(k) plans and individual retirement accounts. It also increased transparency with new notice requirements.
- *Patterson v. Shumate*. Heard in 1992 by the U.S. Supreme Court, the ruling decided that even if a participant files for bankruptcy, creditors are unable to touch the person's retirement account assets under ERISA's anti-alienation provisions.
- *Fort Halifax Packing v. Coyne*. In 1987, the U.S. Supreme Court ruled that severance plans are not subject to ERISA requirements because they are not considered a plan, and do

not require ongoing administrative oversight from employers.

- *Fifth Third Bancorp v. Dudenhoeffer*. In 2014, the nation's highest court determined that there is no presumption of prudence for the retirement plan industry's fiduciary standard in employee stock option plans.
- *Tussey v. ABB, Inc.* Dealing with fees, courts held Fidelity breached its fiduciary duty when it floated income to ABB, Inc. retirement plans. A prior ruling that said the income was not a plan asset is currently on appeal.

4. NINTH CIRCUIT FOLLOWS CALIFORNIA'S RIGHT-TO-CONTROL TEST IN DETERMINING STATUS OF WORKERS: As a central part of its business, FedEx Ground Package System, Inc. contracts with drivers to deliver packages to its customers. The drivers must wear FedEx uniforms, drive FedEx approved vehicles and groom themselves according to FedEx's appearance standards. FedEx tells its drivers what packages to deliver, on what days and at what times. Although drivers may operate multiple delivery routes and hire third parties to help perform their work, they may do so only with FedEx's consent. FedEx contended its drivers are independent contractors under California law. Plaintiffs, a class of FedEx drivers in California, contended they are employees. The panel reversed the multidistrict litigation court's grant of summary judgment entered in favor of FedEx and its denial of a plaintiff class of FedEx drivers' motion for partial summary judgment. The court held that the plaintiff FedEx drivers were employees as a matter of law under California's right-to-control test. The court remanded to the district court with instructions to enter summary judgment for plaintiffs on the question of employment status. California's right-to-control test requires courts to weigh a number of factors: the principal test of an employment relation is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. California courts also consider "several secondary indicia of the nature of a service relationship. The right to terminate at will, without cause, is strong evidence in support of an employment relationship. Additional factors include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of

the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer/employee.

The factors generally cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. Viewing the evidence in light most favorable to FedEx, the operating agreement among the parties grants FedEx a broad right to control the manner in which its drivers' perform their work. The most important factor for the right-to-control test strongly favors employee status. The other factors do not strongly favor either employee status or independent contractor status. Accordingly, plaintiffs are employees as a matter of law under California's right-to-control test. *Alexander v. FedEx Ground Package System, Inc.*, Case Nos. 12-17458 and 12-17509 (U.S. 9th Cir. August 27, 2014). See also, *Slayman v. FedEx Ground Package System, Inc.*, Case Nos. 12-35525 and 12-35559 (U.S. 9th Cir. August 27, 2014), (Oregon Law.)

5. ANNUAL SURVEY OF STATE-ADMINISTERED DB PLANS: The U.S. Census Bureau has released its "Annual Survey of Public Pensions: State-Administered Defined Benefit Data Summary Report: 2013." This report is part of a continuing series designed to provide information on the structure, function, employment, and finances of the United States' over 90,000 state and local governments. Data in this report refer to fiscal years that ended between July 1, 2012, and June 30, 2013, and do not reflect data for the entire calendar year of 2013. This survey covers the following pension system activities: revenues by state (earnings on investments, employee contributions, government contributions); expenditures by state (benefits, withdrawals, other payments); cash and investment holdings by state governmental securities, corporate stocks and bonds, foreign and international securities, etc.); membership information by state (number of pension systems, total membership, beneficiaries receiving periodic payments); and liabilities information by state (covered payroll and pension obligations) for state-administered

pension systems only. State-administered pension systems showed positive earnings on investments in 2013. Gains on investments totaled \$315.9 billion in 2013, 274.0 percent higher than the 2012 earnings, which totaled \$84.5 billion. Total holdings and investments for state-administered pension systems grew by 7.8 percent, from \$2.5 trillion in 2012 to \$2.7 trillion in 2013. Pension systems have substantial investments in financial markets and, consequently, earnings are dependent on change in market performance. Total holdings and investments consist of cash and short-term investments, governmental securities (e.g., U.S. Treasury), nongovernmental securities (e.g., corporate stocks and bonds, foreign and international securities, mortgages, etc.), and other investments (e.g., real property). The two largest investment categories -- corporate stocks and foreign and international securities -- made up over half (56.5 percent) of the total holdings and investments for all state-administered pension systems in 2013. Corporate stocks came to over one-third of the total holdings and investments (36.8 percent) and foreign and international securities comprised approximately one-fifth of the total (19.7 percent). G13-ASPP-ST (August 2014).

6. WORLD'S LARGEST PENSION FUNDS AT YEAR END: Total assets of the world's largest 300 pension funds grew by over 6% in 2013 (compared to 10% in 2012) to reach a new high of almost US\$15 trillion (up from US\$14 trillion in 2012). The P&I/ Towers Watson global 300 research is conducted in conjunction with *Pensions & Investments*. Latin American and African funds had the highest five-year combined compound growth rate of over 16% (albeit from a low base) compared to Europe (12%), North America (around 6%) and Asia-Pacific (around 5%). Defined benefit funds account for 67% of total assets, down from 75% five years ago. During 2013, DB assets grew by around 3%, compared to reserve funds (15%), defined contribution plans (over 9%) and hybrids (over 8%). Sovereign funds continue to feature strongly in the ranking, with 27 of them accounting for 28% of assets and totaling around US\$4.2 trillion. The 113 public sector funds in the research had assets of US\$5.8 trillion in 2013, and account for 39% of the total. Private sector industry funds (61) and corporate funds (99) account for 14% and 19%, respectively, of assets in the research.

7. NEW YORK CONTRIBUTION RATES TO DECREASE: Targeted

News Service reports on a news release issued by the New York State Comptroller. Employer contribution rates for New York State and Local Retirement System will decline in fiscal year 2015-2016. The average contribution rate for the employees retirement system will decrease by about 9% from 20.1% of payroll to 18.2% of payroll. The average contribution rate for the police and fire retirement system will decrease by about 11%, from 27.6% of payroll to 24.7% of payroll. The state pension funds' solid investment performance has delivered another decline to employer contribution rates. Effects of the 2008 financial market collapse are still being felt around the country, but New York's pension funds are well-funded, are steadily recovering and will continue to meet their obligations to more than one million retirement members and retirees. The funded ratio for the New York State and Local Retirement System increased from 88.7% to 92%.

8. **ERRATUM:** We are republishing item 1 of our August 28, 2014 Newsletter because of a typographical error in the caption:

FLORIDA CIRCUIT JUDGE DECLARES PROHIBITION ON SAME-SEX COUPLES FROM MARRYING IN FLORIDA VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSES OF U.S. CONSTITUTION: Miami-Dade County, Florida, Circuit Court Judge Sarah Zabel has granted plaintiffs' motion for summary judgment in a case involving Florida's prohibition on marriage of same-sex couples. The following language, set forth in the United States Supreme Court almost fifty years ago, in *Loving v. Virginia*, applies equally to the instant case, when references to race are removed:

To deny this fundamental freedom on so unsupportable a basis as the . . . classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive the state's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious . . . discriminations.

Loving was not cited once in the State's brief, and it was disingenuous of it to ignore this seminal case rather than attempting to distinguish it. Nevertheless, the court finds that the only distinction between *Loving* and the instant case is the instant case deals with laws that deny the

fundamental freedom to marry based on people's sexual orientation rather than their race. Because this denial is the denial of a fundamental right, it would have to be narrowly tailored to serve a compelling governmental interest in order to be valid. The statutes and constitutional amendment at issue do not meet this standard, and they do not meet the rational basis standard, which only requires them to be rationally related to legitimate governmental interest. Thus, the Court finds that Florida's statutory and constitutional restrictions on same-sex marriage violate the Due Process and Equal Protection Clauses of the United States Constitution. They improperly infringe upon plaintiffs' ability to exercise their fundamental right to marry the person of their choice, and upon their liberty interests regarding personal autonomy, family integrity, association, and dignity. They also unlawfully discriminate on the basis of sexual orientation. *Pareto v. Ruvín*, 21 Fla. L. Weekly Supp. 899 (Fla. 11th Cir. July 25, 2014) (Appeal pending); (stayed pending appeal). See also, *In Re: Marriage Of: Heather Brassner*, 21 Fla. L. Weekly Supp. 920 (Fla. 17th Cir. August 4, 2014); *Huntsman v. Heavilin*, 21 Fla. L. Weekly Supp. 916 (Fla. 16th Judicial Cir. July 17, 2014); and *In Re Estate Of, Frank C. Bangor*, 21 Fla. L. Weekly Supp. 913 (Fla. 15th Cir. August 5, 2014), (non-resident whose surviving spouse of same-sex marriage legal under state of Delaware, and who was named as personal representative of decedent's will, was qualified to serve as personal representative in Florida.)

9. INTERESTING FACTS: When a person dies, hearing is the last sense to go. The first sense lost is sight.

10. TODAY IN HISTORY: In 1950, first helicopter rescue of American pilot behind enemy lines.

11. KEEP THOSE CARDS AND LETTERS COMING: Several readers regularly supply us with suggestions or tips for newsletter items. Please feel free to send us or point us to matters you think would be of interest to our readers. Subject to editorial discretion, we may print them. Rest assured that we will not publish any names as referring sources.

12. PLEASE SHARE OUR NEWSLETTER: Our newsletter readership is not limited to the number of people who choose to enter

a free subscription. Many pension board administrators provide hard copies in their meeting agenda. Other administrators forward the newsletter electronically to trustees. In any event, please tell those you feel may be interested that they can subscribe to their own free copy of the newsletter at <http://www.cypen.com/subscribe.htm>.

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