



CYPEN & CYPEN NEWSLETTER for NOVEMBER 26, 2014

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

1. U.S. PUBLIC RETIREMENT FUNDS ARE DOING RATHER WELL, THANK YOU VERY MUCH: National Conference on Public Employee Retirement Systems recently undertook a comprehensive study exploring retirement practices of the public sector. NCPERS collected and analyzed the most current data available on member funds' fiscal condition and steps they are taking to ensure fiscal and operational integrity. The *2014 NCPERS Public Employee Retirement Systems Study* includes responses from 187 state, local and provincial government pension funds with a total number of active and retired memberships surpassing 11.8 million and assets exceeding \$1.8 trillion. Eighty-one percent were local funds, while 19% were state pension funds. The study finds that public funds continue to respond to changes in the economic, political and social landscape by adopting substantial organizational and operational changes to ensure long term sustainability for their stakeholders. Efforts include limiting number of retiree health benefits, increasing member contribution rates, reducing wage inflation, expanding operational benchmarking and more diligent oversight. The following are some key findings:

- Public funds are becoming more confident of their readiness to address retirement trends and issues over the next two years. Respondents' overall confidence rating increased to 7.9 on a 10 point scale, compared with the 2013 score of 7.8 and 2011 score of 7.4.
- Public funds are becoming more cost effective. The average administrative expense for respondents to administer their fund is 14 basis points. This decrease is from 16 basis points in 2013. However, investment manager expenses increased from 42 to 47 basis points. The total cost of administering the fund and paying investment managers increased from 57 basis points to 61. According to other sources, the average expenses of most equity funds average 74 basis points and hybrid funds average 80 basis points. Thus, public retirement funds with lower expenses provide a higher level of benefit to members and produce a higher economic impact for the communities those members live in than most mutual funds.
- Funds continue to tighten benefits, assumptions and governance. Examples include a continued trend increasing member contribution rates, lowering inflation assumptions, shortening amortization periods, holding actuarial assumed rates of return and lowering the number of retirees receiving health care benefits.
- Funds are currently experiencing healthy 1-year, 3-year, 5-year and 20-year returns. Ten-year returns are reported at 7.6%. Respondents continue to work toward offsetting sharp losses from 2008 and 2009 by strengthening investment discipline. Signs point to long-term improvement in public retirement systems' funded status.
- Funds experienced an increase in average funded level. Responding funds report an average funded level of 71.5%, up from 70.5%. Two factors contributed to the change. First, on average, funds saw 1-year investment returns of 15%. Second, funds continue to lower amortization periods.
- Income used to fund pension programs generally comes from three sources: member contributions, employer contributions and

investment returns. Investment returns are the most significant source (73%). Member contributions make up 8% of fund income. Employer contributions equal about 19%.

2. ILLINOIS LAW REDUCING PENSION BENEFITS UNCONSTITUTIONAL AND VOID IN ITS ENTIRETY:

The Pension Protection Clause of the Illinois Constitution states: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." The constitutional language is plain and unambiguous, and, therefore, the Pension Protection Clause is given effect without resort to other aids for construction. Under the Clause, it is clear that if something qualifies as a benefit of an enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired. The Illinois legislature could not have been more clear that any attempt to diminish or impair pension rights is unconstitutional. Plaintiffs challenged Public Act 98-0599 as violating the Pension Protection Clause of the Illinois Constitution. By way of an affirmative defense, defendants asserted that the Act is justified as an exercise of the State's reserved sovereign powers or police powers. On motions for partial summary judgment, motions for judgment on the pleadings as to affirmative defense, or the alternative, to strike the affirmative defense, an Illinois state circuit judge ruled in favor of the plaintiffs on each motion. On its face, the Act impairs and diminishes benefits of membership in State retirement systems in multiple ways, including the following:

- The Act adds new language to the Pension Code, which provides that, on or after the Act's effective date, the 3% compounded automatic annual increases that have been mandated by the Pension Code for many years shall be a formula that would reduce the automatic annual increase certain pension system members receive.
- The Act provides that the State retirement system members who have not begun to receive a retirement annuity before July 1, 2014, will receive no annual increases at all in certain years.
- The Act also imposes a new cap on the pensionable salary of

members of certain State retirement systems.

- The Act raises the retirement age for members of certain State retirement systems on a sliding scale based upon one's age.
- The Act alters the method for determining the effective rate of interest used to calculate pensions for members under the money-purchase formulas included in the Pension Code.

The Pension Protection Clause contains no exception, restriction or limitation for the exercise of the State's police powers or sovereign powers. Illinois courts, therefore, have rejected the argument that the State retains an implied or reserved power to diminish or impair pension benefits. *In Re: Pension Litigation*, No. 2014 MR 1, (Ill. Cir. Ct., November 21, 2014).

3. JERSEY'S RETIREMENT SYSTEM MAY BE FIRST GASB "VICTIM": New Jersey's retirement system for public employees is in worse shape than previously reported, thanks to recent accounting changes that are starting to be rolled out across the country. Reuters reports that in a document released after a bond sale, the state revealed that one of its five main pension funds will have insufficient assets to cover benefit payments within 10 years. Under new accounting standards issued by Government Accounting Standards Board, the New Jersey system's overall funded level stands at 44% for fiscal 2014, compared to the 63% previously determined by standard actuarial methods. Think about it: on one day a plan is funded at 63% and the next day the very same plan has lost 1/3 of its funding status. What is wrong with this picture?

4. DOCUMENTS IN POSSESSION OF PRIVATE ENTITY MUST BE PRODUCED AS PUBLIC RECORDS BECAUSE COUNTY HAS DELEGATED A STATUTORILY AUTHORIZED FUNCTION TO THE PRIVATE ENTITY: The Brevard County Clerk of the Circuit Court filed a petition for access to public records, claiming entitlement to the production of public records from Economic Development Commission of Florida's Space Coast, Inc. Documents in possession of EDC as a private entity must be produced as public records because Brevard County has delegated a statutorily authorized function to EDC, and the records generated by the EDC's performance of that duty are public records. One thing of note: the

court denied the clerk's request for attorneys' fees. The predicate for attorneys' fees pursuant to Section 119.12, Florida Statutes, is an unlawful refusal. The status of the EDC as an agency under Chapter 119 was unclear when the records requests were made. The EDC reasonably and in good faith denied the Chapter 119 requests because its EDC's status as an agency was unclear. *Ellis v. Economic Development Commission of Florida's Space Coast, Inc.*, 22 Fla. L. Weekly Supp. 261 (Fla. 18th Cir. April 3, 2014). (Note that an appeal is pending in 5th District Court of Appeal.)

5. POLICE OFFICERS' BILL OF RIGHTS DOES NOT PRECLUDE INSPECTOR GENERAL FROM CONDUCTING NON-DISCIPLINARY INVESTIGATIONS INVOLVING POLICE OFFICERS: Miami-Dade County and the Office of the Inspector General appealed from an order granting summary final judgment in favor of Dade County Police Benevolent Association on its claims for declaratory relief and mandatory injunction. Specifically, the lower court found that Section 112.533, Florida Statutes, confers exclusive authority on the Miami-Dade County Police Department to investigate any and all complaints against its police officers, thereby precluding the OIG from conducting an independent, external investigation of off-duty officers' compliance with County policies and procedures regarding outside employment and disclosure of financial gifts and benefits. Because the court could not agree that the above section or any other portion of the Police Officers' Bill of Rights precluded non-disciplinary investigations that involve police officers, the Third District Court of Appeal reversed. Section 112.533, Florida Statutes, is not the exclusive means for investigating and determining complaints against Miami-Dade Police Department personnel, because neither the county charter provision creating the OIG nor the ordinance according it investigatory powers is preempted by or conflicts with that provision. The Florida Supreme Court has held that charter county ordinances are unenforceable when the county (1) legislates in a subject area that has been preempted by the State or (2) enacts an ordinance that directly conflicts with a statute. The charter provision and ordinance at issue are neither preempted by state law nor in conflict with it. *Miami-Dade County v. Dade County Police Benevolent Association*, 39 Fla. L. Weekly D2452 (Fla. 3d DCA November 24, 2014).

6. WELCOME BACK, NEW LONDON FIREFIGHTERS: New London,

Connecticut, firefighters are back to participating in a municipal defined benefit plan after being in a defined contribution plan for 17 years. According to pionline.com, the International Association of Fire Fighters determined that the DC plan was not serving the needs of its members. The firefighters are now part of the \$1.8 billion Connecticut Municipal Employees Retirement System. The plan was finalized in October 2014, and went into effect retroactively, so firefighters were considered CMERS participants as of August 1, 2014. The decision to switch to a DC plan in 1997 was not a good one. Since some of the members had borrowed money against their DC plan, in order for the union to move back to a DB plan, all members had to pay back DC plan loans. Until all members could produce or borrow funds to pay back the money they borrowed, the union was stuck with the DC plan. The local union chapter agreed to back the loans, and provided collateral, allowing the entire membership to switch back to a DB plan that better served its needs.

7. FEDERAL RETIREMENT BENEFITS MAY BE IN G.O.P. CROSS-HAIRS: Federal employees are bracing for more bad news about their retirement benefits, as Republicans prepare to control both chambers of Congress. According to pionline.com, federal workers hired before 2012 contribute 0.8% of their salaries to the \$412 billion Federal Employees Retirement System, while those hired in 2012 or later contribute up to 4.4%, depending on when they started. (An estimated 10% of workers participate in the predecessor to FERS, the Civil Service Retirement System.) FERS system includes the \$404 billion Thrift Savings Plan; eligible employees receive an automatic contribution of 1% of pay from their employer into the TSP, as well as matches on their own contributions.

8. IMPORTANT SUPREME COURT LABOR AND EMPLOYMENT LAW DECISIONS OF 2014: The Supreme Court weighed in on some key labor and employment cases in 2014, including two ERISA cases and one challenge to certain requirements of the Affordable Care Act. According to ebenefitsnews.com, the following decisions promise to have significant ramifications for employers and benefit plans:

- *Burwell v. Hobby Lobby Stores, Inc.* For religious reasons, three private companies objected to including coverage for certain forms of contraception in their employer-provided health care

plans, as required under the Affordable Care Act. The Supreme Court, in an opinion bound to have significant ramifications, determined that the HHS regulations create a substantial burden on the company owners' religious exercise and held that the companies did not have to follow the regulation.

- *Heimeshoff v. Hartford Life & Accident Insurance Co.* This case involved an appeal of an insurance company's denial of an employee's long-term disability benefit claim under her employer's insurance plan. Heimeshoff filed suit against the insurance company in district court, but after the plan's stated three-year statute of limitations had expired. The district court and court of appeals dismissed the case under the statute of limitations. A unanimous Supreme Court agreed that because ERISA does not mandate a statute of limitations, the court must uphold the plan's language.
- *Fifth Third Bancorp v. Dudenhoeffer.* Former Dudenhoeffer employees alleged their employer violated its duties as a fiduciary of the company ESOP by ignoring signs that the company stock was risky and overvalued. They also accused the employer of misrepresenting its financial strength to investors and thereby artificially inflating its stock. The employer argued an earlier decision provided fiduciaries with a presumption that their purchase or sale of company stock was prudent. The Supreme Court sided with the employees, and held that ESOP fiduciaries are not entitled to any enhanced deference when purchasing or selling company stock.
- *Harris v. Quinn.* A 5-to-4 majority of the Supreme Court ruled that, in some cases, unions could not collect fees from one particular class of public employees who did not want to join. The Harris plaintiffs were home health care personal assistants arguing against the need to pay "fair share" dues as part of a collective bargaining agreement between the State of Illinois, their employer, and a labor union selected to represent them.
- *Lane v Franks.* Edward Lane sued the president of Central Alabama Community College after he was fired from his job leading the school's program for at-risk youth. Lane had discovered a state representative was on the program's payroll,

despite doing no work for the group. The president fired Lane after he testified in an FBI case against the president. In a unanimous decision, the Supreme Court justices ruled that the First Amendment protects public employees who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.

9. THERE ARE EIGHT MILLION STORIES IN THE NAKED CITY: Here are two of them (from FindLaw):

- A couple having sex in car caused traffic jam, and got arrested. An Oregon couple having sex in a car parked outside a city jail (first mistake) were themselves taken to jail after their vehicular tryst caused traffic to back up. A 24 year old woman and a 33 year old man had been at a local strip club. When the couple left the club and walked back to their car, they say they got "caught up in the moment." They apparently were not the only ones enjoying the moment, as callers to the police department reported them having sex in a car, causing traffic to back up. When officers responded to the area, they found the couple inside the car and "still engaged." Talk about *coitus interruptus*.
- A woman's naked arrest leads to lawsuit. A Florida woman has filed a lawsuit against the Miami Beach Police Department after she was arrested wearing only a loose robe that kept coming off, allegedly exposing her naked body to officers. (And the problem is...?) Police were called to a Miami Beach apartment building after a cab driver called to report that a woman had gone inside to get money to pay for her cab fare, but never returned. The woman was arrested for *petit* theft, along with battery on a law enforcement officer, and resisting arrest after officers said she became combative. The charges were later dropped, but not before she was subjected to humiliation and unnecessarily harsh treatment from officers, she claimed in a lawsuit against the department. It really hurts to be picked up by the fuzz.

10. HOW THE GREAT RECESSION AFFECTED CHANGES IN RETIREMENT: Among the victims of the Great Recession were the retirement expectations of many Americans. New research from nonpartisan Employee Benefit Research Institute has quantified just how much those hopes suffered. The report from EBRI finds a nearly

23-percentage-point drop in workers retiring early or close to their expected retirement after the markets crashed. Specifically, EBRI found that before September 2008 (the start of the recession), 72.4% of workers retired either before or shortly after (no more than one year) their expected retirement. However, that dropped to 49.6% after September 2008. EBRI analysis is among the first to look at longitudinal survey data that compare expected and actual retirement for the same group of workers. It finds that 55.2% of these workers retired within three years (before or after) of their expected retirement. Specifically, the longitudinal findings show that 38.0% retired before they expected, 48.0% retired after they expected, and 14.0% retired the year they expected to retire. It also shows that more people (35.9%) actually retired after 65 than expected (18.9%), and among those who expected to retire after 65, 56.6% did so. The study also shows that these longitudinal findings (comparing one cohort at different times) differ from cross-sectional findings (comparing different cohorts at the same time), which are reported more frequently. It shows that in 2012, the expected probability of working full-time after age 65 was 48.7% and 46.0%, respectively, among men and women working full-time. However, only 12.7% of men and 6.0% of women worked full-time after 65 in 2012. EBRI also found that people who have a retirement plan tend to retire closer to when they expected, compared with those without a plan. The gap between expected and actual retirement among those with defined benefit plans and defined contribution plans is generally very small.

11. GEOGRAPHY'S ROLE IN EMPLOYMENT-BASED RETIREMENT PLAN PARTICIPATION: A new Issue Brief from Employee Benefit Research Institute says the percentage of workers participating in an employment-based retirement plan rose in 2013, increasing for the first time since 2010 among all workers and private-sector workers. Retirement plan participation level depends on the type of worker being considered:

- Among all American workers in 2013, 51.3% worked for an employer or union that sponsored a retirement plan, while 40.8% participated in a plan.
- Among wage and salary workers ages 21-64, sponsorship rate increased to 56.0%, and the portion participating increased to 45.8%.

- Among full-time, full-year wage and salary workers ages 21-64, sponsorship rate was 62.3% and 54.5% of all workers participated in a retirement plan.
- Almost 74% of wage and salary public sector workers participated in an employment-based retirement plan.

Being white or having attained a higher educational level was also associated with higher probabilities of participating in a retirement plan. Hispanic wage and salary workers were significantly less likely than both white and black workers to participate in a retirement plan, although native born Hispanics were more likely to participate than non-native born Hispanics. The overall gap between the percentages of black and white plan participants narrowed when compared across earnings levels, with blacks surpassing whites at the income level of \$75,000 or more. While the overall percentage of females participating in a plan was lower than that of males, when controlling for work status or earnings, the female participation level actually surpassed that of males in 2013. The retirement plan participation gender gap significantly closed from 1987-2009 before widening in 2010-2012 but nearly closed again in 2013. Of the 67.9 million wage and salary workers who worked for an employer that did not sponsor a plan, 17.9 million (26.4%) were ages 25 or younger or 65 or older. Almost 30 million (43.6%) were not full-time, full-year workers, and 29.2 million (43.0%) had annual earnings of less than \$20,000. Furthermore, 39.3 million (57.8%) worked for employers with less than 100 employees. Workers at large employers were far more likely to participate than those at smaller firms. Across all ages, workers with employment-based health insurance from their own employers were more than twice as likely to participate in a retirement plan as those without health insurance from their own employers.

12. FINALLY...A STORY OF HOW POLS NEGOTIATE TO SAVE THEIR ASS(ETS): Pension benefits can be a major perquisite of working in the public sector, and for public employees under investigation or facing possible sanctions, they are a major consideration in choosing how to proceed, according to thelegalintelligencer.com. Investigation of public officials puts them at risk for all kinds of different sanctions. Other than a criminal conviction, absolutely the thing they are worried about, especially if they are at the end of their careers, is their pension. In two recent

cases involving high-profile elected officials at the state level, the pension question worked out in the officials' favor, although they did lose their positions. For former state Senator LeAnna Washington, D-Philadelphia, a plea bargain saved her pension. For former Pennsylvania Supreme Court Justice Seamus P. McCaffery, it was a retirement and resignation that ended the Judicial Conduct Board's investigation into allegations against him. Sometimes it is in the investigators' and the prosecutors' interests to consider working out some kind of deal because it saves the taxpayer money. (Come again?) There is never a 100%, for-sure conviction. There is not a guarantee a conviction will be obtained. (That statement is, in our judgment, beside the point.) Former Senator Washington pleaded guilty to one conflict-of-interest charge, leading the state to drop a charge for diversion of services. She was able to keep her pension as a result, and avoid jail time, and law enforcement was able to get a conviction. But Washington's situation is very different from McCaffery's. When McCaffery retired near the end of October, he was allowed to keep his pension. Although he was facing allegations about his conduct, the JCB had not charged him with any wrongdoing. The JCB said it would drop investigations into whether McCaffery violated any judicial ethics canons by sending porn to a government email address, allegedly getting a traffic ticket issued to his wife fixed, allegedly calling a lower court about judicial assignments and for his wife's receipt of referral fees while working as a chief judicial assistant in McCaffery's chambers. In McCaffery's situation, both sides had incentive to make a deal. Investigations can be long and arduous on both sides with no guarantee regarding the ultimate outcome. The reputation and function of the Supreme Court may also have been a consideration. Pennsylvania's Public Employee Pension Forfeiture Act requires employees convicted of certain crimes related to public office or public employment to forfeit all their pension benefits other than their own contributions. Members of the judiciary are named specifically in the state constitution, which defines additional forfeitures applying to any justice, judge or justice of the peace who is suspended, removed or barred from holding judicial office for conviction of a felony or misconduct in office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute. In Washington's case, the diversion of services charge could have caused her to lose her pension. Because of her guilty plea on the other charge, it was dropped. The Act lists types of

criminal convictions that lead to forfeiture, but even then it is sometime unclear whether a resigned government employee's actions will affect his pension. Some question why the pension law contains forfeitures of entire pension, when misconduct often occurred usually at the end of the game, and for a limited period of time. How would one determine when misconduct commenced and when it ended? And furthermore, maybe the person just got caught in the end.

13. DILLERISMS: Whatever you may look like, marry a man your own age. As your beauty fades, so will his eyesight. Phyllis Diller

14. STUFF YOU DID NOT KNOW: Half of all Americans live within 50 miles of what? Their birthplace.

15. TODAY IN HISTORY: In 1956, "The Price Is Right" debuts on NBC.

16. 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.

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

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