



**CYPEN & CYPEN**  
**NEWSLETTER**  
**for**  
**JANUARY 28, 2016**

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Never Forget September 11, 2001

and

Always Remember May 2, 2011

**1. APPLICABILITY OF NORMAL RETIREMENT AGE REGULATIONS TO GOVERNMENTAL PENSION PLANS:** In our January 26, 2016 Special Supplement Newsletter, we promised more details on the recent proposed Internal Revenue Service regulations under section 401(a) of the Internal Revenue Code relating to the determination on whether section 414 of the IRC satisfies the requirements of section 401(a) of the IRC. Here is a piece by International Foundation of Employee Benefit

Plans which provides more detail:

[https://www.ifebp.org/news/regulatoryupdates/Pages/IRS-NRA-Governmental.aspx?utm\\_source=Informz&utm\\_medium=email&utm\\_campaign=Headlines+012016+US](https://www.ifebp.org/news/regulatoryupdates/Pages/IRS-NRA-Governmental.aspx?utm_source=Informz&utm_medium=email&utm_campaign=Headlines+012016+US).

## **2. CALLAN PERIODIC TABLE OF INVESTMENT RETURNS 1996-**

**2015:** Callan's Periodic Table of Investment Returns depicts annual returns for ten asset classes, ranked from best to worst performance for each calendar year. The table of investment returns conveys the strong case for diversification across asset classes (The asset classes are color-coded to enable easy tracking over time, unless you are color-blind). Callan describes the well-known industry-standard market indexes used as proxies for each asset class in the text that follows:

S&P 500 GROWTH	5.52%
S&P 500	1.38%
BARCLAYS AGG	0.55%
MSCI EAFE	-0.81%
RUSSELL 2000 GROWTH	-1.38%
S&P 500 VALUE	-3.13%
RUSSELL 2000	-4.41%
BARCLAY'S CORP HIGH YIELD	-4.47%
RUSSELL 2000 VALUE	-7.47%
MSCI EMERGING MARKETS	-14.60%

- Barclays Aggregate Bond Index includes U.S. government,

corporate and mortgage-backed securities with maturities of at least one year.

- Barclays High Yield Bond Index measures the market of USD-denominated, non-investment grade, fixed-rate, taxable corporate bonds.
- MSCI EAFE is a Morgan Stanley Capital International Index that is designed to measure the performance of the developed stock markets of Europe, Australasia and the Far East.
- MSCI Emerging Markets is a Morgan Stanley Capital International Index that is designed to measure the performance of equity markets in 21 emerging countries around the world.
- Russell 2000 measures the performance of small capitalization U.S. stocks. The Russell 2000 is a market-value-weighted index of the 2,000 smallest stocks in the broad-market Russell 3000 Index.
- Russell 2000 Value and Russell 2000 Growth measure the performance of the growth and value styles of investing in small cap U.S. stocks.
- S&P 500 measures the performance of large capitalization U.S. stocks. The S&P 500 is a market-value-weighted index of 500 stocks. The weightings make each company's influence on the Index performance directly proportional to that company's market value.
- S&P 500 Growth and S&P 500 Value measure performance of the growth and value styles of investing in large cap U.S. stocks.

### **3. FORMER ASSISTANT STATE ATTORNEY WHO HAD**

**WITHDRAWN FUNDS FROM FLORIDA RETIREMENT SYSTEM  
INVESTMENT PLAN INELIGIBLE FOR REENROLLMENT IN FRS  
UPON ELECTION AS JUDGE:**

Judge Campbell appealed the order of the State Board of Administration denying her request for renewed membership in the Florida Retirement System as an elected officer. SBA concluded that Judge Campbell was a retiree who was ineligible for reenrollment in FRS pursuant to Section 121.122(2), Florida Statutes. The Florida Second District Court of Appeal affirmed. Judge Campbell was employed by State of Florida as an assistant state attorney and was a member of the FRS investment plan. Approximately two and a half years after leaving employment, Judge Campbell withdrew all of the funds from her FRS account. In 2009, Chapter 121, Florida Statutes, governing FRS, was amended to prohibit retirees who are elected or appointed to a position with an FRS employer on or after July 1, 2010, from participating in FRS. Judge Campbell was elected circuit court judge in August 2012. Thereafter she sought reenrollment in the FRS pursuant to Section 121.052, Florida Statutes, which makes enrollment in FRS compulsory for elected officers. However, SBA determined that Judge Campbell was a “retiree” as defined by Section 121.4501(2)(k), Florida Statutes, because she is a former member of the investment plan who has terminated employment and taken a distribution of vested employee or employer contributions. Section 121.122(2), Florida Statutes, prohibits a retiree of a state administered system who is initially reemployed in a regularly established position on or after July 1, 2010, from reenrolling in the FRS. On appeal, Judge Campbell asserted that her enrollment in FRS was compulsory because she is an elected officer.

She contended that the definition of “retiree” given in Section 121.4501(2)(k), Florida Statutes, applies only to investment plan members, and is either not applicable to her as an elected officer or is in conflict with the compulsory participation in FRS. The appellate court agreed with the SBA’s interpretation that Judge Campbell’s contentions on appeal were inconsistent with provisions of Section 121.053, Florida Statutes that states on or after July 1, 2010 a retiree of a state administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System. Judge Campbell also challenged constitutionality of Chapter 121, Florida Statutes, as applied to her because it allegedly deprived her of her rights to renewed membership in the FRS as an elected officer. The First District Court of Appeal had previously addressed a constitutional challenge to Chapter 121, Florida Statutes. There, the Court explained that at most the (appellant) had an expectant or contingent right insofar as his right to renewed membership in the FRS depended on the continued existence of that right if he ever returned to FRS-covered employment at some point in the future. Even if retirees had a vested right to reenrollment, the legislature had the authority prospectively to alter the right to benefits that might accrue from future state employment. Any right that Judge Campbell had to future retirement benefits was not vested at the time of the legislative amendment, and was, in any event, subject to alteration by the legislature. *Campbell, v. State of Florida, State Board of Administration*, Case No. 2D15-214 (Fla. 2d DCA January 22, 2016).

#### **4. SUBROGATION UNDER ERISA MAY DEPEND ON WHETHER PARTICIPANT HAS DISSIPATED THIRD PARTY SETTLEMENT:**

Employee benefits plans regulated by Employee Retirement Income Security Act of 1974 often contain subrogation clauses requiring a plan participant to reimburse the plan for medical expenses if the participant later recovers money from a third party for his injuries. In a recent United States Supreme Court case, petitioner Montanile was seriously injured by a drunk driver, and his ERISA plan paid more than \$120,000 for his medical expenses. Montanile later sued the drunk driver, obtaining a \$500,000 settlement. Pursuant to the plan's subrogation clause, respondent plan administrator (Board), sought reimbursement from the settlement. Montanile's attorney refused that request and subsequently informed the Board that the fund would be transferred from a client trust account to Montanile unless the Board objected. The Board did not respond, and Montanile received the settlement. Six months later, the Board sued Montanile in Federal District Court under §502(a)(3) of ERISA, which authorizes plan fiduciaries to file suit to obtain appropriate equitable relief to enforce the terms of the plan. The Board sought an equitable lien on any settlement funds or property in Montanile's possession and an order enjoining Montanile from dissipating any such funds. Montanile argued that because he had already spent almost all of the settlement, no identifiable fund existed against which to enforce the lien. The District Court rejected Montanile's argument, and the Eleventh Circuit affirmed, holding that even if Montanile had completely dissipated the fund, the plan was entitled to reimbursement from Montanile's

general assets. The U.S. Supreme Court reversed: when an ERISA plan participant dissipates a third party settlement on nontraceable items, the plan fiduciary may not bring suit under §502(a)(3) to attach the participant's separate assets. *Montanile v. Board of Trustees of The National Elevator Industry Health Benefit Plan*, Case No, 14-723 (U.S. January 20, 2016).

## **5. HOW TO GET PUBLIC WORKERS THE RETIREMENT INCOME**

**THEY NEED:** *Governing* reports that there are nearly 20 million public-sector workers across America, and providing for their future retirement security grows more complex with each budget cycle. States and municipalities want to do right by employees who have devoted their careers to public service, yet they also must contend with rising health care costs, other public investment needs and the concerns of taxpayers. The right approach to public-sector pensions should give workers the sustainable retirement income they have come to expect, while giving governments and taxpayers greater cost certainty. Accomplishing this means embracing solutions that merge some of the best features from the defined benefit and defined contribution worlds. But asking public sector workers to plan for their own retirement by focusing on wealth accumulation has major drawbacks. Many Americans lack expertise in investment selection and asset allocation. In defined benefit plans, investment experts employed by the plan remove this burden from workers. Defined contribution plans try to do the same by offering target date funds, which can put workers on an automatic path to accumulate assets early and reduce risk as retirement nears. Yet even when they

incorporate TDFs, defined contribution plans oriented toward asset accumulation can leave workers exposed to certain risks that can jeopardize their income in retirement. Longer lives can leave retirees short on income in their final years. The possibility of low or negative returns early in retirement can erode savings over the long term. So can inflation. And as we age, we run the cognitive risk of being unable to make appropriate decisions about our financial well-being. Given these risks, it is little wonder that 47% of government workers say that concerns about running out of money to cover monthly expenses in retirement keep them up at night. To allay these concerns, public sector plans should maintain lifetime income as the core objective, offering a defined contribution solution that helps workers generate retirement income that they cannot outlive (see item 15 below). With knowledge about a worker's likely income trajectory, length of employment, outside sources of retirement income (including Social Security) and other life factors, innovative retirement approaches can help put employees on the right path. Using an income replacement ratio of 70% to 100% of pre-retirement income is a good rule of thumb. An investment approach commonly used in defined-benefit plans, known as liability-driven investing, makes this income-driven approach feasible for employers and employees in a defined contribution environment. With an LDI approach, workers and employers contribute to retirement accounts, and then the individual is placed in an asset allocation model (based on age, savings and other retirement metrics) that is adjusted according to a methodology, chosen by the employer, that puts retirement income front and center. Predictable, income-producing assets that might be passed

over in an accumulation driven portfolio -- such as guaranteed annuities or U.S. Treasury Inflation Protected Securities -- may become integral features of an income driven portfolio. These products are designed to generate income and manage risk effectively throughout retirement.

**6. DOES UNIFORM RETIREMENT AGE MAKE SENSE?:** Center for Retirement Research at Boston College in a new brief raises that very question. In the face of rising life expectancies, many policy experts argue that today's workers can retire later and still spend the same fraction of their lives in retirement as past generations. But such an argument assumes that all workers, regardless of socioeconomic status (SES), have experienced the same increase in life expectancy. In fact, evidence suggests that life expectancies for low-SES individuals have been improving more slowly than for high-SES individuals in recent decades, causing the life expectancy gap to grow. The brief, based on a recent study, builds on prior research by estimating trends in mortality (the flip side of life expectancy) from 1979-2011 by education, a common measure of SES. These estimates are then used to see how much longer each educational group can work today if the goal is to maintain the same ratio of retirement years to working years as existed in 1979. The discussion is organized as follows. The first section describes the data and methodology used in the analysis. The second section presents the results. The final section concludes that, due to growing mortality inequality, policies aimed at extending work lives uniformly may not be fair to low-SES individuals. January 2016, Number 16-1.

## **7. BANKRUPTCY OPPONENT FRANKLIN DECIDES NOT TO**

**APPEAL:** After nearly four years of addressing financial issues, the city of Stockton's bankruptcy woes are over, according to recordnet.com. The final creditor holdout, Franklin Investments, decided to let the deadline for an appeal of the bankruptcy decision pass without filing. That means there is no further worry that the bankruptcy plan approved last year will unravel because Franklin thought it was unfair. Franklin had lost an earlier appeal, too. This would have been an appeal of that decision. "We are of course disappointed by Bankruptcy Appellate Panel's ruling on December 12, 2015 and have decided against pursuing another appeal," the firm said in a news release. "This case was widely followed by municipal investors, and we feel this ruling may unfortunately cause investors to have serious reservations about investing in California local government general fund obligations. The ultimate effect will likely be an increased cost of borrowing for infrastructure and other projects for our local communities." Franklin, which lent the city \$35 million for various projects in 2009, had contested Stockton's court-approved financial reorganization after receiving a roughly 12% repayment from Stockton of \$4.35 million in total. But Franklin argued it only received a repayment of less than 1% on the \$31 million portion of the loan that was unsecured by collateral. According to a news release by City Manager Kurt Wilson, the city attempted to avoid Chapter 9 by holding mediation sessions with its largest creditors in late February 2012. After 90 days, the city reached agreement with nearly all labor groups. But with no agreement with its largest creditors, the city was unable to reverse its insolvency and had no choice but to seek bankruptcy protection on June 28, 2012. The city

ultimately reached agreements with all its creditors, save for Franklin. In 2014, a federal judge upheld a confirmation of the city's plan to exit Chapter 9 bankruptcy. In early 2015, the city made millions of dollars in payments to its creditors -- including to more than 1,000 retirees -- transferred real estate assets to a new parking authority, and executed numerous documents that consummated the negotiated settlements with its major creditors. Those and other transactions meant that the city officially exited bankruptcy on February 25, of that year, with Franklin continuing to appeal. Franklin appealed and was rejected November 19, 2015. A second appeal was heard last month before the United States Bankruptcy Appellate Panel of the Ninth Circuit, which issued an opinion dismissing Franklin's appeal on most of the claimed grounds for appeal, and affirming the rulings of the bankruptcy court on the remaining grounds. Among other rulings, the appellate panel concluded that the city's plan was not unfairly discriminatory toward Franklin, that Franklin's deal had been substantially consummated, and that "reversing the Confirmation Order would knock the props out from under the plan and would leave the bankruptcy court with an unmanageable situation on remand." Avoiding the expense and resource demands of yet another appeal will allow the city to focus on continuing its upward trajectory and advancing the policy directives of the city council," Wilson said. "I'm grateful to our legal team for guiding us as we navigated this difficult path and to the city council for having the courage to allow staff to stay the course, even in the face of uncertainty and criticism. The sacrifices of our citizens, employees, retirees and other creditors paved the way to our recent successes. Wilson said Franklin's decision does not mean the city

is out of the woods, though. “While this is a significant victory and we are ecstatic, we still have an obligation to commit to the promises we made to the court,” he said.

#### **8. METHODIST PENSION BOARD BLACKLISTS FIVE BANKS:**

According to plansponsor.com, the pension fund board for the United Methodist Church has blocked five Israeli banks from its investment portfolio. According to news reports, the board describes the move as a broad review meant to weed out companies that profit from abuse of human rights. The General Board of Pension and Health Benefits blacklisted Bank Hapoalim, Bank Leumi, First International Bank of Israel, Israel Discount Bank and Mizrahi Tefahot Bank. In February 2015, the General Board of Pension and Health Benefits of The United Methodist Church, and its Wespeth investment management division, announced the implementation of two new investment guidelines. The guidelines provide direction for identifying and managing the excessive sustainability risk that could potentially affect the value of assets held on behalf of benefit plans and institutional investment clients. One guideline relates to climate change; the other relates to human rights.

#### **9. HOW BIG YOUR RETIREMENT FUND SHOULD BE AT EVERY**

**AGE:** Many people are overwhelmed by the responsibility of having to amass enough cash for retirement, according to the *Washington Post*. Only about half of workers participate in a workplace retirement savings plan, according to the Bureau of Labor Statistics. And once they have a retirement account, few people ever do the math on how much money

they will need to be able to retire, or check if they are on pace to get there. That is why advisers use rules of thumb to help people figure out how much money they should have saved when they retire, along with milestones they should aim for at certain ages along the way. For instance, you may have heard it is smart to save one times your salary by age 35. That is what one investment firm used to recommend that people save when they are starting out if they wanted to have reasonable financial security in retirement. Now, the firm is recommending that people save one times their salary by their 30th birthday. By the time they are 35, savings should add up to double their annual pay. By 40, a retirement account should hold three times a person's salary. The numbers keep growing, all the way to age 67, by which retirement savings should add up to 10 times a person's pay. For people who have never stopped to think about how much income they will have in retirement, or if they need to save more, this timeline could push some people to pause and do the math. One of the biggest questions people have, especially as they are starting out, is "Am I on track?" The firm updated its guidelines last month to reflect a more conservative rate return that it says is closer to what might be seen for a portfolio that is at least 50% invested in stocks. The firm now assumes savings will grow by about 3% a year on average, compared to the previous model that assumed a fixed rate of return of 5.5% a year, including inflation adjustments. The new rules are also meant to apply to a broader group of workers and savers. (The previous guideline was based on a person earning \$70,000.) Given how much Americans already struggle with saving, the numbers might hit some people like a punch in the gut. Too

often, workers realize just years before they hope to retire that they do not have anywhere near the amount of savings they need to pay the bills. Indeed, more than half of people age 55 and up do not have any money saved for retirement, according to a 2015 report from the Government Accountability Office. And about half of those people are not getting a pension, leaving them with little to no retirement income outside of Social Security benefits. Still, this is just one guideline which is meant for people who plan to retire at 67 and who want to have their savings provide at least 45% of their pre-retirement pay. Those people who plan to work longer, or who expect to have fewer expenses in retirement, should adjust the guide to meet their needs. It is meant to give people some sort of a gauge, and to get them interested and thinking about it. If this timeline scared you, use it as a prod to start thinking about what you could do to boost your savings rate. For starters, the guideline assumes that savers have been setting aside at least 15% of their pay throughout their careers, including any employer contributions. If you are not saving at least that much, that could be one target to aim for. If you cannot save as much as you want to at the moment, set it up so that your contribution rate increases automatically by one or two percentage points each year. This is the rule of thumb for the best-case scenario. Not everyone is there, but the closer you can get, the more comfortably you might live in retirement.

**10. FPPTA WINTER TRUSTEES SCHOOL:** The Florida Public Pension Trustees Association's Winter Trustee School will take place on January 31, through February 3, 2016 at the Hilton Orlando Lake Buena Vista,

Lake Buena Vista, Florida. A link on FPPTA's web site, [www.fppta.org](http://www.fppta.org), will take you to the Hilton Orlando Lake Buena Vista site to make your room reservations. You may access information and updates about the Conference at FPPTA's website. All police officer, firefighter plan participants as well as general employee pension plans, board of trustee members, plan sponsors and anyone interested in the administration and operation of the Chapters 112, 175 and 185 pension plans should take advantage of this Conference.

**11. SO YOU THINK YOU KNOW EVERYTHING:** All 50 states are listed across the top of the Lincoln Memorial on the back of the \$5 bill.

**12. TODAY IN HISTORY:** In 1942, German troops occupy Benghazi, Libya. (Does this place sound familiar?)

**13. 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.

**14. 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>.

**15. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.**