



CYPEN & CYPEN
NEWSLETTER
for
MAY 12, 2016

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

1. FLORIDA SUPREME COURT INVALIDATES WORKERS' COMPENSATION LAW FEE PROVISION: The Florida Supreme Court was asked to evaluate constitutionality of the mandatory fee schedule in Section 440.34, Florida Statutes, which eliminates the requirement of a reasonable attorney's fee to the successful claimant. Considering that the right of a claimant to obtain a reasonable attorney's fee has been a critical feature of the workers' compensation

law, the Supreme Court concluded that the mandatory fee schedule in Section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions, as a violation of due process. This issue arose out of a question certified by the First District Court of Appeal to be of great public importance, rephrased by the Supreme Court as follows:

WHETHER SECTION 440.34, FLORIDA STATUTES (2009), WHICH MANDATES A CONCLUSIVE FEE SCHEDULE FOR AWARDING ATTORNEY'S FEES TO THE CLAIMANT IN A WORKERS' COMPENSATION CASE, IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Here, petitioner, Castellanos, was injured during the course of employment with the respondent, Next Door Company. Through the assistance of an attorney, Castellanos prevailed in his workers' compensation claim, after the attorney successfully refuted numerous defenses raised by the employer and its insurance carrier. However, because section 440.34 limits a claimant's ability to recover attorney's fees to a sliding scale based on the amount of workers' compensation benefits obtained, the fee awarded to Castellanos's attorney amounted to only \$1.53 per hour for 107.2 hours of work determined by the Judge of Compensation Claims to be "reasonable and

necessary” in litigating this complex case. (The statute in question provides for an attorney’s fee of 20% of the first \$5,000 of the amount of the benefits secured, 15% of the next \$5,000 of the amount of benefits secured, 10% of the remaining amount of the benefit secured to be provided during the first ten years after the date the claim is filed and 5% of the benefits secured after ten years.) *Castellanos v. Next Door Company*, No. SC13-2082 (Fla. April 28, 2016).

2. PALM BEACH OFFICIALS ADOPT NEW PENSION PLAN FOR POLICE, FIREFIGHTERS: The Palm Beach City Town Council voted to adopt a new pension benefit plan, in hopes of improving recruitment and retention of employees in the Fire-Rescue and Police departments, where deep pension cuts enacted in 2012 triggered an exodus of workers, ([See C & C Newsletter for February 11, 2016, Item 2](#)) The council voted 4-1 to abandon an unpopular hybrid plan, which sharply reduced defined benefits while adding a defined contribution plan that was not popular with the department’s employees. The new defined benefit plan will take effect at some point after the end of the budget year on September 30, 2016. The new defined contribution plan raises to 2.75, instead of 1.25, the multiplier used to determine benefit levels, reduces to 56, instead of 65, the eligibility age to draw benefits and increases employee contributions into the system to a range of 8% to 12% percent, depending on the market performance of invested funds. The increased benefits would be paid for with around \$5 million annually that is used to help pay for the defined contribution plan that will be going away. That money has

been used to match 8% of public safety employee pay going into individually invested retirement accounts. It will cover the cost of the increased benefits and still leave \$161,000 that will be used to pay for a portion of the unfunded liability of the town's pension plan over 30 years, according a report from the Palm Beach *Daily News*.

3. IMPROVING DEFINED BENEFIT PLANS: It is a progressive strategy to keep defined benefit plans active and strengthen them, says plansponsor.com. If plan sponsors are eyeing targeted income replacement, a defined benefit plan is the most efficient way to provide it. These plans also are more efficiently manage the flow of the work force than do defined contribution plans; that is helping older workers retire so companies can bring in fresh talent. As far as costs, those related to pension plans follow economic cycles. Because we are in a period of low interest rates, pension costs are high, but at some point that situation will change. In the 1990s, plan sponsors could not even contribute to their plans because they were overfunded. As we move in and out of economic cycles, pensions can be a very low cost way to provide benefits. So, if a plan sponsor wants to keep and strengthen its defined benefit plan, what should it do?

- Make administration coordinated and comprehensive. In many situations, plan sponsors lack a firm understanding of who is in the plan and what benefits each has accrued. If there are too little data to determine what the plan owes, how will it know its liabilities? It is crucial to have a robust administrative platform

and technology to hold and maintain data.

- Keep benefits affordable. Plan sponsors typically want a defined benefit plan the company can afford yet is also competitive with industry peers. These demands are hard to align. Plan sponsors can start with determining what income replacement they want to give employees when they retire, but they also must consider plan maintenance costs such as actuarial expenses and Pension Benefit Guaranty Corporation premiums. Sponsors should analyze the true actuarial costs to see whether they can afford the benefits they want to provide.
- Make funding robust. U.S. corporations are still fairly cash rich, as the economy has discouraged expansion. In recent years, plan sponsors may have counted on rising interest rates to bail them out, but that situation has not happened, so they should contribute more cash to ensure pensions are well-funded. Sponsors should adopt and follow a funding policy. Many companies have struggled to contribute what is required, but following such a policy will improve funded status.
- Diversify. From an investment perspective, keeping defined benefit plans healthy is similar to keeping yourself healthy -- avoid bad habits. Pension plans should keep to a well thought out long term strategy, remain invested in a well-diversified portfolio and stay the course through market volatility.

Those plan sponsors seeking to hedge against interest rates should buy long corporate and government bonds; although plan liabilities

grow when interest rates fall, the value of those investments also goes up.

4. TREASURY DENIES TEAMSTERS' APPLICATION FOR REDUCTION OF PENSION BENEFITS:

On September 25, 2015, Board of Trustees, Central States, Southeast and Southwest Areas Pension Plan submitted an application to the Secretary of the Treasury on behalf of the pension plan. The application requested approval to reduce benefits under the Multiemployer Pension Reform Act of 2014. The Special Master, appointed by the Secretary, has written a letter on May 6, 2016 notifying the Board of Treasury's decision denying the application because the suspension fails to satisfy the statutory criteria for approval of benefit suspensions. The Special Master reviewed the application under the terms of the Act, its implementing regulations and other applicable law. He also reviewed numerous comments received on the application from organizations and individuals. The application states that the Plan is projected, absent suspension, to become insolvent within ten years, and that, if the application were approved, approximately 270,000 people would have some portion of their pension benefits reduced beginning in July of this year. Keeping in mind the potential impact on so many people's lives, the Special Master held meetings, including conference calls and a series of public sessions around the country, with a wide range of stakeholders, including plan representatives and several thousand plan participants and beneficiaries, as well as others who have commented on the application. Under the Act, Treasury, in

consultation with the Pension Benefit Guaranty Corporation and the Secretary of Labor, must approve an application upon finding that the plan is eligible for the benefit suspensions and has satisfied the applicable statutory requirements. The Act requires, among other things, that the proposed benefit suspensions be reasonably estimated to allow the plan to avoid insolvency. Put another way, a key test for any application under the Act is whether the proposed benefit suspensions take a plan off the path to insolvency. The Treasury finds that the plan's proposed benefit suspensions are not reasonably estimated to allow the plan to avoid insolvency. Specifically, after reviewing the application and consulting with PBGC and DOL, Treasury has determined that the suspensions described in the application fail to satisfy the following three requirements set forth in the Act:

- that the proposed benefit suspensions, in the aggregate, be reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency, because the investment return and entry age assumptions used for this purpose are not reasonable, Code § 432(e)(9)(D)(iv);
- that the proposed benefit suspensions be equitably distributed across the participant and beneficiary population, Code § 432(e)(9)(D)(vi); and
- that the notices of proposed benefit suspensions be written so as to be understood by the average plan participant, Code § 439(e)(9)(F).

The application failed to meet the requirements of the Act for reasons described above. The notification letter will be made public in order to inform plan participants of the outcome of Treasury's review. Nice going, Ken.

5. TEAMSTERS REPLY: Separately, the Board of Trustees, Central States, Southeast and Southwest Areas Pension Plan has responded to Treasury's notification that the proposed pension rescue plan had been denied (see item 4 above.) Although the decision by the Trustees to file the application under provisions of the Multiemployer Pension Reform Act 2014 was gut wrenching, the trustees are disappointed with Treasury's decision, as they believe the rescue plan provided the only realistic solution to avoiding insolvency. The Board of Trustees will carefully consider the most appropriate next steps, based on this denial and the final guidance issued by Treasury on April 26, 2016. Central States Pension Fund remains in critical and declining status, and is projected to run out of money within ten years, or even less. Because Pension Benefit Guaranty Corporation, the government's pension insurance program, is also projected to run out of money, the decision means that, absent legislative action or an approved rescue plan, Central States participants could see their pension benefits reduced to virtually nothing. The Trustees strongly encourage all fund participants to call their Congressional representatives to demand legislative action that protects their pension benefits.

6. TO SAVE WISELY FOR RETIREMENT, SOMETIMES LESS

CHOICE IS BETTER: Wharton School says choice is good -- up to a point. After that, too many options are just too confusing or take too much work to bother with. An embarrassment of riches can make the outcome worse, not better. It has happened to many 401(k)s, 403(b)s and other defined contribution retirement savings plans found in the workplace. At some point, the employer's well-meant effort to let employees tailor their accounts to their own needs may be overdoing it. The choice menu for 401(k) plans has been growing more and more complex. Offering more options would seem to make a plan more appealing, helping to retain workers and attract new ones, and providers like mutual fund companies have made it easy to add options. Why not include a gold fund or foreign bond fund if it is easy to do? Some employees, at some point, may want it. Since it often seemed like a simple thing to add, frequently it was just done. But what are the unintended consequences? Over the years, research has shown that choice itself can be demotivating, keeping workers on the sidelines or discouraging them from managing their accounts wisely. Because defined contribution plans like 401(k)s have largely taken the place of old-fashioned pensions, or defined-benefit plans, the federal government has been pressing employers to be clearer about plan options and expenses -- a goal that becomes harder when choices are too numerous. It has come to a head recently because of various cases where expenses were brought to light or made more salient. Investment results suffer when fees are too high, and employees are more likely to stumble into high-fee funds when having

too many options discourages doing proper homework. So how can employees benefit if a plan is streamlined and better organized? The findings are described in the paper “Simplifying Choices in Defined Contribution Retirement Plan Design,” which can be found at: <http://www.nber.org/papers/w21854>. Though there are many elements to the study’s findings, they boil down to a conclusion that simplifying a defined contribution plan can benefit employees by nudging them toward choices with lower fees and transaction costs, and encouraging a more prudent balance between expected returns and safety. The fact that very few participants chose the wide open brokerage option indicates that employees are content with a plan that has fewer, simpler choices, presented in a format that is easier to understand. What is the ideal number of funds for a workplace plan? That tough questions depends a lot on participants’ situations. A single participant could be well served by choosing between three to five funds. Many plans now include target-date funds, especially in the default used for employees who do not choose a portfolio blend for themselves. An employer can satisfy employees inclined to manage their accounts more actively by offering the brokerage option, which allows investing in just about anything, which would enable the firm to keep the ordinary list of options short enough to avoid confusion.

7. LOW DEFINED CONTRIBUTION SAVINGS MAY POSE

CHALLENGES: The United States Government Accountability Office reports an estimated 40% of all U.S. households had some retirement savings in a defined contribution plan, such as a 401(k) plan, in 2013,

and account balances varied by household income and race in recent years, according to the most recent data from the Survey of Consumer Finances. The 60% of all households (and specifically 44% of working households) without any DC savings in 2013 may result from several factors. Approximately 39% of working households lacked access to, or were not eligible to participate in, an employer-sponsored DC plan at their job in 2013. Low-income households and black and Hispanic households were even less likely to have access to a DC plan at their workplaces or to have DC savings. For example, GAO found that approximately 25% of working, low-income households had any savings in a DC plan compared to 81% of working, high-income households. Additionally, access and account balances declined for some, but not all, groups during the recent recession and recovery from 2007 to 2013. For example, Black working households' median DC plan balance declined by \$14,700 (in 2015 dollars), from \$31,100 in 2007 to \$16,400 in 2013. Meanwhile, white working households' median DC balance did not change significantly over the same period. By 2013, white households' median DC balances were more than three times larger than for black and Hispanic households'. GAO projections of household DC plan savings at retirement vary widely across earning groups, and by key individual and employer decisions. These projections of DC savings accumulated over a career for a simulated group born in the same year differ from analysis of the SCF, which estimates current savings of different age groups. According to GAO's projections, households in the lowest earning group accumulated DC savings that generated

lifetime income in retirement, as measured by an annuity equivalent, of about \$560 per month on average (in 2015 dollars). Yet, 35% of this group had no DC savings at retirement. In contrast, households in the highest earning group saved enough to receive about 11 times more per month in retirement and only 8% had no DC savings. GAO also simulated several scenarios involving workers' decisions (participating in a DC plan or maximizing the employer match) and employer decisions (offering a DC plan or automatic enrollment) that increased the amount of projected DC savings available for retirement -- particularly for low-earning workers. While GAO's projections of these scenarios show many possible ways to increase DC savings, they do pose potential tradeoffs for both workers and employers. GAO-16-408 (May 2016).

8. LAWMAKER TOUTS PROPOSALS TO HELP AVERT

RETIREMENT CRISIS: Benefitnews.com says American workers are in a financial pickle, so to speak, sandwiched between rising healthcare costs and stagnant pay. A whole host of things makes planning for retirement difficult, says a senior pension fellow at the American Academy of Actuaries, including longevity risks. Educate and start thinking about retirement earlier -- you cannot wind back the hands of time, he said, speaking at a panel on Capitol Hill organized by the Insured Retirement Institute. Once you have missed 10 years of saving, you cannot go back in time. According to recent IRI data, all generations currently have hurdles. For example, only 24% of baby boomers say they are confident in their current savings. Twenty-nine

percent of millennials, meanwhile, say they are actively saving, and report their most common financial challenge is reducing debt. Rep. Joe Crowley (D-N.Y.), says the savings and retirement crisis will only get worse, as the years go by, and adds that 401(k) plans and other defined contribution plans are nothing like the defined benefit pension plans of old, which offered protection to employees in their golden years. But several initiatives are in the pipeline to help employers and employees with financial security. One example is President Obama's somewhat controversial myRA starter retirement savings account. Aside from savings, it is also a rainy day account. Nothing is more debilitating to a worker than when a car breaks down. If they go to an IRA account, they are penalized if it is drawn too soon. The myRA gives them the ability to keep working, take money out, fixing the car but at the same time keep saving and it costs nothing to the employer. Another less well-known program is Crowley's Secure, Accessible, Valuable, Efficient Universal Pension proposal, accounts that would be funded by employers with 10 or more employees if they do not already offer a retirement plan. Although he is still seeking additional comments and suggestions, employers would contribute \$0.50 for every hour worked by an employee. Once enrolled, employees would also begin automatically contributing 3% of their pre-tax income, with employee contributions gradually increasing over time unless the employee opts out. If a minimum wage worker works full time for 45 years, takes nothing but the \$0.50 per hour employer contribution, that employee would see \$160,000 upon retirement based on average stock and bond rates of return, and with minimum, gradually

increased contributions, could see as much as \$320,000. Last, Crowley advocated a final proposal that would provide tax incentives to small employers helping employees save for retirement. A small business would receive a refundable tax credit equal to the value of its contributions to the retirement accounts of up to 10 employees, to a maximum of \$10,400 per year for five years. The refundable tax credit would be available to any small business with less than \$5 million in annual gross receipts. And because the tax credit is refundable, any eligible employer including start-up companies that may not yet be profitable, would be eligible to receive the credit.

**9. IRS ANNOUNCES WITHDRAWAL OF PROPOSED
NONDISCRIMINATION RULES APPLICABLE TO CERTAIN
QUALIFIED RETIREMENT PLAN BENEFIT FORMULAS:**

Department of the Treasury and the Internal Revenue Service announced they will withdraw certain provisions of proposed regulations published on January 29, 2016 (81 FR 4976) relating to nondiscrimination requirements applicable to qualified retirement plans under § 401(a)(4), ([See C & C Newsletter Special Supplement for January 26, 2016.](#)) The provisions of the Proposed Regulations that will be withdrawn are the provisions that would modify §§ 1.401(a)(4)-2(c) and 1.401(a)(4)-3(c). The provisions of the Proposed Regulations that would modify §§ 1.401(a)(4)-2(c) and 1.401(a)(4)-3(c) were intended to address certain qualified retirement plan designs that take advantage of flexibility in the existing nondiscrimination rules to provide a special benefit formula for

selected employees without extending that formula to a classification of employees that is reasonable and established under objective business criteria. Following publication of the Proposed Regulations, the Treasury Department and IRS have given additional consideration to the potential effects of the provisions that would modify §§ 1.401(a)(4)-2(c) and 1.401(a)(4)-3(c) on the adoption and continued maintenance of qualified retirement plans with a variety of designs and have concluded that further consideration will be needed with respect to issues relating to those provisions. Accordingly, the Treasury Department and IRS will withdraw the provisions of the Proposed Regulations that would modify §§ 1.401(a)(4)-2(c) and 1.401(a)(4)-3(c). The Proposed Regulations also include provisions, in addition to those that would modify §§ 1.401(a)(4)-2(c) and 1.401(a)(4)-3(c), that provide relief from the nondiscrimination requirements for certain qualified retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula and would make other changes to the nondiscrimination rules. The proposed regulation does not apply to governmental plans. To read the Proposed Regulations please visit <https://www.federalregister.gov/articles/2016/01/29/2016-01675/nondiscrimination-relief-for-closed-defined-benefit-pension-plans-and-additional-changes-to-the>. Announcement 2016-16 (April 2016.)

10. WHEN TRAGEDY OCCURS, YOUR FAMILY CAN COUNT ON

THE FOLKS AT SOCIAL SECURITY: “Social Security Matters,” Social Security’s Blog, recognizes that tragedy strikes without warning. For families who lose a wage earner, it can have a devastating financial impact in addition to the emotional one. Social Security touches the lives of every American, often in times of tragedy and uncertainty. It is true. Social Security’s programs go beyond retirement and disability benefits. Social Security helps care for the surviving families of deceased entitled workers. If you work, some of the Social Security taxes you pay now goes toward survivors benefits for workers and their families. In the event of your death, certain family members -- widows, widowers (including your divorced spouse), children and dependent parents -- may be eligible for survivors benefits. Social Security’s survivors benefits may be more valuable than your individual life insurance. The benefit amount your family is eligible for depends on your average lifetime earnings. The more you earned, the more benefits will be. Check your Social Security Statement to see an estimate of survivors benefits Social Security could pay. In certain circumstances, Social Security also makes a one-time payment of \$255 to your spouse or child if you have worked long enough. Survivors must apply for this payment within two years after date of death. For more information about how Social Security’s survivors benefits can help your surviving dependents, please read survivors benefits or visit ssa.gov/pubs/EN-05-10084.pdf. No one likes to think about death, but, unfortunately, it is inevitable. When it happens, know that you can count on Social Security to be there for your loved ones. (Note to future fraudsters: if

you intend on ripping off a decedent's pension plan by not disclosing his death, do not apply for the survivors benefit!)

11. FREE WEBCAST ABOUT ACCUMULATED SICK AND VACATION PAY DEFERRED TO 403(B) OR 457(B) PLANS: Internal Revenue Service, Federal, State & Local Governments, is presenting a free webcast about when is accumulated sick and vacation leave pay subject to Federal Employment Taxes. It will be held on June 2, 2016, 2:00 p.m. (Eastern). To register for this event: <https://www.webcaster4.com/Webcast/Page/925/15027>.

Learn about:

- When is accumulated sick and vacation leave pay subject to Federal Employment Taxes
- When can taxes be deferred and for how long?
- What is an elective contribution?

12. EMPLOYEE OR INDEPENDENT CONTRACTOR?: Internal Revenue Service, Federal, State & Local Governments, is presenting a free webcast about TE/GE Worker Classification, Employee or Independent Contractor? It will be held on May 12, 2016, 2:00 p.m. (Eastern). To register for this event: <https://www.webcaster4.com/Webcast/Page/925/14635>. Learn about:

- Why this matters
- How to recognize Control Factors
- Benefits of Voluntary Compliance

- How the Form SS-8 can help

Unfortunately there will be no continuing education credit for this event, but what do you expect for free?

13. WOMAN ASSAULTED BY MAN, GRABS HIS TESTICLES, DETAINING HIM UNTIL POLICE ARRIVE: A Tennessee man is in custody after a woman he allegedly assaulted grabbed him by the testicles, subduing him until the police arrived. According to leoaffairs.com, police statements from witnesses said the victim claimed that 55-year-old Maurice Gray returned to his Nashville home “extremely intoxicated”, throwing items out of the refrigerator and destroying cookware. The victim is his girlfriend. When the victim confronted Gray, he reportedly upper-cutted the woman several times before pinning her down, attempting to strangle her. Thinking quickly, the woman secured a grip on Gray’s testicles, prompting him to stop. (No kidding.) When the woman began removing Gray’s things from the house, the woman again grabbed the man by his scrotum, this time keeping him in a vise grip until police arrived. Witnesses backed the victim, resulting in Gray’s being arrested for vandalism and aggravated assault-strangulation. There sure are a lot of nuts in this world.

14. FLORIDA LAWYER WHO “WON’T REPRESENT DRUNK DRIVERS” ARRESTED FOR DUI!: A Florida lawyer known for his anti-DUI commercials was arrested for driving under the influence,

according to leoaffairs.com. Personal injury lawyer David J. Maloney is known for his anti-DUI advertisements, often telling the audience that “If you drink and you drive and you hurt someone, don’t call me. I’m not gonna represent you, I’m not gonna help you. If anything, I’m gonna be the lawyer going after you.” Maloney was spotted speeding through Escambia County, in a Lamborghini, near Pensacola Beach when Sheriff’s Deputies pulled the 49 year-old over. A Sheriff’s office spokesman said the deputy found probable cause that Maloney was under the influence of alcohol, and booked him into the Escambia County Jail. Maloney posted a \$500 bond. (Note to Maloney: if we do want to call you, will you answer on your “cell” phone?)

15. 37TH ANNUAL POLICE OFFICERS' AND FIREFIGHTERS' PENSION TRUSTEES' SCHOOL: The 36th Annual Police Officers' & Firefighters' Pension Trustees' School will take place on May 16-18, 2016. You may access information and updates about the Conference, including area maps, a copy of the program when completed and links to register at the Residence Inn Tallahassee Universities at the Capitol. Please continue to check the FRS website for updates regarding the program at www.myflorida.com/frs/mpf. All police officer, firefighter and general employee plan participants, 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 unique, insightful and informative program.

16. GOLDEN OLDIE HITS RENAMED: Some of the pop stars of yesteryear are revising their hits with new lyrics to accommodate aging Baby Boomers. They include: Ringo Starr -- I Get By With A Little Help From Depends.

17. SO YOU THINK YOU KNOW EVERYTHING: Your stomach has to produce a new layer of mucus every two weeks otherwise it will digest itself.

18. TODAY IN HISTORY: In 1890, Louisiana legalized prize fighting.

19. 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.

20. 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>.

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