



**CYPEN & CYPEN**  
**NEWSLETTER**  
**for**  
**MARCH 2, 2017**

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Never Forget September 11, 2001  
and  
Always Remember May 2, 2011

**1. WILL SOCIAL SECURITY BE THERE FOR YOU?:** In its February 2017 issue of *GRS Perspectives*, [grsconsulting.com](http://grsconsulting.com) posits that important question. By way of background, on August 14, 1935, President Franklin D. Roosevelt signed the Social Security Act into law (Public Law 74-271). The new Act created a social insurance program designed to pay

continuing income to retired workers age 65 and older. It has been described as a watershed achievement of social welfare reform in American history. For the first time, retired workers were guaranteed a basic floor of protection against the hardships of poverty. The first taxes were collected in 1937, and the first lump sum payment was made that same month in the amount of \$0.17. In January 1940, regular ongoing monthly benefit payments began with the first monthly check for \$22.54. The first recipient had paid a total of \$24.75 in Social Security taxes, and lived to collect \$22,888.92 in benefits, more than 1,000 times the amount the individual had paid into the Social Security program. In its original form, Social Security only paid retirement benefits to the primary worker. Survivor benefits, disability benefits and benefits for spouses and children were added later. The original contribution rate was 1% of the first \$3,000 of compensation for both the employer and the employee. Social Security, as we understand it today, consists of the Old Age and Survivors Insurance Fund and the Disability Insurance Fund. The combination is sometimes called "OASDI." Social Security covers virtually all private sector employees and 75% of public employees. Consequently, it is an important part of retirement planning for almost all Americans. It is also an enormous federal program. In 2015, it paid out \$897 billion in benefits and received \$920 billion in income. Income included \$93 billion in interest and \$32 billion from taxation of benefits, in addition to income from the 12.4% Social Security tax. At the time of this writing, 60 million individuals are receiving \$75 billion per month in benefits. In 2017, the Social Security contribution rate is 6.2% for both the employer and the employee on the first \$127,200 of earned income.

The figure of \$127,200 is called the “Taxable Wage Base.” This limit is adjusted annually for inflation. There is a 1.45% tax on all earned income for both employers and employees for Medicare, so that the total tax is 15.3% (= 6.2%+ 6.2% + 1.45% + 1.45%). High earners and people with investment income are subject to additional Medicare taxes. The total tax is called the “FICA” tax. Arguably FICA is not a tax because it is directly linked to benefits. Arguing against that concept is the fact that Social Security benefits are not guaranteed. They do not have the same protections in federal law as other types of retirement benefits. This GRS Perspective first explains how Social Security benefits are calculated. Then, it discusses how they are funded and the current funding status of OASDI. Finally, it discusses various ideas for changing the system, primarily related to methods for dealing with the enormous financial strain that is projected to face Social Security in just a few years. The various ideas for change did not originate with GRS. For the most part, they can be found in public sources that are cited in the bibliography. To read the entire publication visit: [http://www.grsconsulting.com/wp-content/uploads/2017/02/GRS-Perspective\\_SocialSecurity-Final.pdf?utm\\_source=February+27%2C+2017+Publications+Alert&utm\\_campaign=Publications+Alert+February+2017&utm\\_medium=email](http://www.grsconsulting.com/wp-content/uploads/2017/02/GRS-Perspective_SocialSecurity-Final.pdf?utm_source=February+27%2C+2017+Publications+Alert&utm_campaign=Publications+Alert+February+2017&utm_medium=email).

**2. UNDER 401(K) PLAN SAFE HARBOR RULES FOR HARDSHIP DISTRIBUTIONS, WHO IS A DEPENDENT?:** *EBIA Weekly Newsletter* asks and answers the following question:

**QUESTION:** A 401(k) plan offers in-service hardship distributions using

the Code's hardship safe harbor events. Three of those events -- medical, educational and funeral expenses -- permit hardship distributions to be made on account of a participant's dependent. Who is a dependent for those safe harbor hardship events?

**ANSWER:** The safe harbor hardship events for medical, educational, and funeral expenses use the definition of "dependent" under Code §152, with certain modifications. Here is a brief summary.

A dependent is defined under Code § 152 as either --

- a "qualifying child," defined as an individual who (1) bears a specified relationship to the employee (relationship test); (2) has the same principal abode as the employee for more than half of the year (residency test); (3) meets certain age requirements (age test); (4) has not provided more than half of his or her own support for the year (limited self-support test); and (5) has not filed a joint tax return (other than only for a claim of refund) with his or her spouse for the year (marital/tax filing status test); or
- a "qualifying relative," defined as an individual (1) who bears a specified relationship to the employee (relationship test); (2) whose gross income is less than the exemption amount in Code §151(d) (income test); (3) with respect to whom the employee provides over half of the individual's support (support test); and (4) who is not anyone's qualifying child.

However, an individual generally will not be a dependent under Code §152 if the individual is a dependent of a Code §152 dependent, a

married dependent filing a joint tax return or a citizen or national of a country other than the United States. For purposes of the safe harbor medical and educational expense hardships, the regulations modify the Code §152 rules so individuals can be dependents of Code §152 dependents, they can be married dependents filing joint tax returns, and their gross income can fail the income test. For the safe harbor funeral expense hardship, the regulations only allow plans to disregard the income test. Note that the safe harbor educational and funeral expense hardships are available for a participant's children, and all three events (medical, educational and funeral expenses) are available for a participant's spouse, without regard to Code §152. The regulations under Code §152 should be consulted for specific determinations, as they define "relationship," "residency" and "support." They also include rules for children of divorced or separated parents.

### **3. WHAT TO DO WITH UNCASHED DISTRIBUTION CHECKS AND MISSING PARTICIPANTS?:**

Markley Actuarial Services, Inc. estimates that uncashed checks account for billions of dollars, representing a fortune of uncollected funds belonging to plan participants or beneficiaries that they are unable to use, and also represent serious issues for fiduciaries. Uncashed distribution checks occur when retirement plan participants fail to cash or deposit a distribution check from their defined contribution plan, for a variety of reasons, including:

- An incorrect mailing address;
- A lost or misplaced physical check;

- A distribution check that was not anticipated (mandatory cash-out of account balances of \$1,000 or less); or
- As the result of inaction on the part of the participant.

The uncashed checks issue is a problem that has gained the attention of the Department of Labor and Internal Revenue Service. The DOL estimates that each year \$15 million in retirement plan distribution checks goes unclaimed because plan participants, or their beneficiaries, have failed to cash distribution checks. And it is rapidly becoming a material issue for retirement plans. This article focuses on defined contribution plans, although defined benefit plans have issues as well, especially since benefits may not be payable until normal retirement age, which could be well after participants terminate employment, allowing lots of time for them to go missing. Readers can obtain the entire Markley piece at: <https://markleyactuarial.com/dealing-with-uncashed-distribution-checks-and-missing-participants/>.

**4. MILLENNIALS COULD DRIVE MORE ESG INVESTING:** A new survey by American Century Investments examines Millennials' preferences pertaining to "impact" or "environmental, social and governance" investing programs. Matching the common assumption made about the generation's investing preferences, American Century's data suggest Millennials do in fact strongly favor investment opportunities that consider more than just a bottom-line return. Many would be willing to sacrifice some financial return to ensure their investments met certain ethical standards, often having to do with the environment and social

justice issues. Overall slightly more than half (51%) of Millennials say they view ESG/impact investing ideas favorably, while just 37% of Gen Xers and 32% of Baby Boomers agree. Millennials are also far and away the most likely to say their investments' impact on society and the environment should be among the most important and primary considerations when building portfolios. There is a range of ESG/impact investing themes that capture Millennial's attention. For example, one in three Millennials said "health care, including disease prevention and cures," is what "matters most to them if they were to make an impact investment." It should be noted that American Century provides investment opportunities along these lines. The reporting concludes that the promotion of impact investing may not be a priority of the Trump administration, but this could be compensated for by the enthusiasm of Millennial investors -- and other generations as well.

**5. INTERNATIONAL PENSION PLAN SURVEY 2016:** Willis Towers Watson has issued the results of its 2016 International Pension Plan Survey, an annual survey considering international pension plans (IPPs) and international savings plans (ISPs). The survey examines specific plan design features and membership or eligibility criteria. This year's survey covers 847 plans sponsored by 794 companies (an increase from 721 plans sponsored by 638 companies in the 2015 survey). The IPP/ISP market continues to develop and the number of IPPs/ISPs in existence continues to rise. Out of the total number of plans in the 2016 survey, 24% were set up in the last four years, which illustrates the continuing trend for IPPs/ISPs to be set up by global companies with

internationally mobile employees and local employees requiring pension provision where local arrangements are inadequate or absent. Here are some key findings:

- IPPs/ISPs are offered by companies in excess of 20 business sectors, with high prevalence in Banking and Finance, Oil and Gas, Industrials, and Engineering and Power.
- 59% have been established with a 'retirement objective' (IPPs), with 41% having more a shorter-term 'savings objective' (ISPs). Over recent years there has been increasing interest and a shift towards the ISP savings-based approach.
- IPPs/ISPs are increasingly being used for local employees based in countries where there are serious economic difficulties by paternalistic sponsoring employers.
- The highest concentration of plans (40%) reported a design having a flat contribution scale as opposed to service- or age-related scales.
- 59% of contributory plans have no employer matching contributions. In the cases where employer matching is a feature, 1:1 matching is more prevalent than 1:2 matching.
- The most popular minimum contribution rate for employers is less than 5% of pensionable salary (after removing the 'nil' category – meaning no contributions at all) followed by the 5% to 9% bracket. Whereas the maximum employer contributions are most commonly between 5% and 9%, with 10% to 14% being the next most popular range.

- Pensionable salary is most commonly defined as ‘base salary only’ (71% of responses) followed by ‘base plus bonus’ and ‘all remuneration’ with only 12% and 9% of the responses respectively.
- A majority has voluntary employee contributions (contributions are not compulsory and not based on a set range or scale) or are non-contributory (employee contributions are not incorporated into the design or are not allowed).

## **6. U.S. SUPREME COURT DENIES CERTIORARI ON PETITION REQUESTING REVIEW OF ENFORCEABILITY OF FORUM**

**SELECTION CLAUSES IN ERISA-GOVERNED BENEFIT PLANS:** The Supreme Court of the United States declined to decide the issue of whether forum selection clauses contained in ERISA benefit plans are enforceable when it denied Certiorari in *Clause v. U.S. District Court for the Eastern District of Missouri*. The Supreme Court's denial of certiorari in *Clause* allows to stand an 8th circuit decision upholding the enforceability of a forum selection clause contained in a benefit plan governed by ERISA, which required the plan participant to litigate her claims in a particular forum. ERISA itself provides that a participant or beneficiary may bring a claim for benefits, “in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found.” 29 U.S.C. § 1132(e)(2). Forum selection clauses in ERISA plans typically limit where such claims may be brought, to where the plan is administered. Proponents of such clauses generally argue that limiting the forum in which a claim may be brought allows for some degree of uniformity in how claims will be handled, while

opponents of such clauses generally state that they impose an increased burden on claimants by requiring them to litigate in a distant forum. While the only two U.S. appellate courts to rule on the issue of forum selection clause enforceability as it relates to ERISA benefit plans (the 6th and 8th Circuits) have upheld their validity, it is worth noting that several U.S. district courts within other circuits have found these clauses unenforceable (typically on grounds of public policy, as well as contradicting ERISA's own choice of forum clause). Perhaps a split of opinion among the circuits is what the Supreme Court is looking for before it will decide to take on the issue itself; however, given the rising use of forum selection clauses in ERISA-governed benefit plans, it is likely only a matter of time before that occurs. It must be remembered that denial of certiorari by the Supreme Court is of no precedential value. Therefore, while forum selection clauses within ERISA-governed benefit plans may continue to be enforced in the 6th and 8th Circuits, other circuits are still free to adopt the opinion that such clauses are invalid and thus unenforceable. *Clause v. U.S. District Court for the Eastern District of Missouri*, U.S. Dist. LEXIS 719 (January 17, 2017); summary by Corey Schechter.

## **7. IRS CRIMINAL INVESTIGATION RELEASES 2016 ANNUAL**

**REPORT:** The Internal Revenue Service has released its IRS Criminal Investigation annual report, reflecting the significant accomplishments and criminal enforcement actions taken in fiscal year 2016. IRS CI initiated 3,395 cases in fiscal year 2016 that focused on tax-related identity theft, money laundering, public corruption, cybercrime and

terrorist financing. The CI report is released each year for the purpose of highlighting the agency's successes while providing a historical snapshot of the make-up and priorities of the organization. CI is the only federal law enforcement agency with jurisdiction over federal tax crimes. This year, CI again boasted a conviction rate rivaling all of federal law enforcement at 92.1%. That conviction rate speaks to the thoroughness of the investigations. CI is routinely called upon by prosecutors across the country to lead financial investigations on a wide variety of financial crimes including international tax evasion, identity theft, terrorist financing and transnational organized crime. CI investigates potential criminal violations of the Internal Revenue Code and related financial crimes in a manner to foster confidence in the tax system and compliance with the law. The 50-page report summarizes a wide variety of IRS CI activity throughout the fiscal year and includes case examples on a range of tax crimes, money laundering, public corruption, terrorist financing and narcotics trafficking financial crimes. To view the annual report visit: [https://www.irs.gov/pub/foia/ig/ci/2016\\_annual\\_report\\_02092017.pdf](https://www.irs.gov/pub/foia/ig/ci/2016_annual_report_02092017.pdf). IR-2017-47, (February 27, 2017).

#### **8. BURNING QUESTION: WHY MUST I WAIT FOR MY OVERTIME?:**

Curt Varone answers the following question:

Firefighters work a 24 hours-on, 48 hours-off schedule based on a 28-day work period. They are paid every week but only receive FLSA overtime every four weeks. There are times that I work 72 hours in the first week of my work period but do not see payment for the overtime for

3 more weeks! I read that the FLSA requires employers to promptly pay employees for all hours worked -- including overtime. Does the city violate the FLSA if it withholds OT for 3 weeks?

**Answer:** It is more complicated than it seems. Yes, the FLSA requires that employees be paid “as soon as practical”, but no, the FLSA does not require that a firefighter be paid for any extra hours worked within a week of when they are worked. In fact if you think about a 28-day work period, your employer may not know whether the extra hours you worked in week 1 make you eligible for overtime until the 28-day period is over! While those extra hours you worked in week 1 may have been beyond your regularly scheduled hours, they do not necessarily qualify as overtime hours. Until you have worked 212 hours in that 28-day work period, you are not entitled to FLSA overtime.

**9. NEW YORK TEACHER PENSION PLAN PRAISED FOR BEING 94% FUNDED:** The National Council on Teacher Quality has recommended that teacher pension plans allow the flexibility for employees to contribute to defined contribution plans instead of just defined benefit plans and allow people to be vested earlier. The report gave New York’s pension plan high marks for being well funded at about 94.2%. It is one of only seven states that top the 90% mark. South Dakota and Wisconsin have fully-funded teacher pension systems and Illinois is at the lowest with 42%. Teachers only have the option of a defined benefit plan in 38 states, including New York. It does not provide for a defined contribution-style plan such as a 401k. However, the report criticized the state

because the pension plan is not fully portable, and teachers have to wait 10 years before they are fully vested. New York is one of 27 states that make teachers wait 7 to 10 years to vest. Only 6 states allow teachers to take their contributions and a portion of the employer contributions if they leave early. The report points out that nearly two-thirds of every dollar contributed by employers to the teacher retirement systems goes to pay off the pension debts that have accrued rather than to provide current teacher benefits or save for future benefits. It also said the state could do a better job of making sure teachers and the public understand the pension system's standing and future health. New York's system sets when teachers can retire based on age, rather than the number of years worked. The report also criticized states for having unrealistic rates of return on their investments. Last year, 41 states made their calculations based on a rate of return of 7.5% and 13 states set them at 8%. The actual returns are lower. The pension crisis has a direct impact on teacher compensation and the ability of school districts to attract and retain high quality teachers.

**10. IRS HAS REFUNDS TOTALING \$1 BILLION FOR PEOPLE WHO HAVE NOT FILED A 2013 FEDERAL INCOME TAX RETURN:** The Internal Revenue Service announced that unclaimed federal income tax refunds totaling more than \$1 billion may be waiting for an estimated 1 million taxpayers who did not file a 2013 federal income tax return. To collect the money, taxpayers must file a 2013 tax return with the IRS no later than this year's tax deadline, Tuesday, April 18, 2017. Remember, there is no penalty for filing a late return if you are due a refund. The IRS

estimates the midpoint for potential refunds for 2013 to be \$763; half of the refunds are more than \$763 and half are less. In cases where a tax return was not filed, the law provides most taxpayers with a three-year window of opportunity for claiming a refund. If they do not file a return within three years, the money becomes the property of the U.S.

Treasury. The law requires taxpayers to properly address mail and postmark the tax return by that date. The IRS reminds taxpayers seeking a 2013 refund that their checks may be held if they have not filed tax returns for 2014 and 2015. In addition, the refund will be applied to any amounts still owed to the IRS, or a state tax agency, and may be used to offset unpaid child support or past due federal debts, such as student loans. By failing to file a tax return, people stand to lose more than just their refund of taxes withheld or paid during 2013. Many low-and-moderate income workers may have been eligible for the Earned Income Tax Credit. For 2013, the credit was worth as much as \$6,044. The EITC helps individuals and families whose incomes are below certain thresholds. The thresholds for 2013 were:

- \$46,227 (\$51,567 if married filing jointly) for those with three or more qualifying children;
- \$43,038 (\$48,378 if married filing jointly) for people with two qualifying children;
- \$37,870 (\$43,210 if married filing jointly) for those with one qualifying child, and;
- \$14,340 (\$19,680 if married filing jointly) for people without qualifying children.

In Florida there is a total of \$67,758,000 in potential refunds. The IRS estimates there 66,900 individuals who have not filed a 2013 tax return, with a median estimated refund of \$776. IR-2017-50 (March 1, 2017).

## **11. GINSBURG AND OTHER SUPREME COURT JUSTICES PUMP**

**IRON:** Bryant Johnson works as a staffer in the clerk's office of the U.S. District Court for the District of Columbia, and serves as an Army reservist. In his spare time, he works as a personal trainer. His clients? Nearly half of the highest court in the United States, and a handful of appellate judges to boot. Justices Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan all enlist Johnson to keep their bodies as fit as their minds. Ginsburg, whose personal workouts are the stuff of legend (and whose personal health has been a key concern for liberals since November), told *Politico* that after the death of her husband, and then her close friend Justice Antonin Scalia, Johnson is the most important person in her life. Johnson was certified as a personal trainer in 1997, and began training judges, deputy U.S. marshals and other court personnel at the facility inside the E. Barrett Prettyman Federal Courthouse, which houses Washington's district court, appeals court and the U.S. FISA Court. He calls his company "Body Justice." Ginsburg began seeing Johnson in 1999, after recovering from colon cancer. "Johnson's niche makes him perhaps the world's only personal trainer whose job it is to ensure that his clients keep riding the bench," *Politico's* Ben Schreckinger writes. Schreckinger replicated Ginsburg's personal workout with Johnson and video-taped the entire thing, writing that afterwards, "Sore, disoriented and cranky, I did not feel a day over 65."

**12. WHY ARE THERE SMALL BUMPS ON THE “F” AND “J” KEYS OF EVERY KEYBOARD?:** Now that you have checked and indeed

found that the “F” key and the “J” key do in fact have small bumps on them, go to <http://www.businessinsider.com.au/f-j-keys-bumps-keyboard-2017-1> to find out why.

**13. NEW OFFICE ADDRESS:** Please note that Cypen & Cypen has a new office address: Cypen & Cypen, 975 Arthur Godfrey Road, Suite 500, Miami Beach, Florida 33140. All other contact information remains the same.

**14. CRAZY STATE LAWS:** *Good Housekeeping* reminds us that there are crazy laws in every state. In Connecticut ... a pickle must be able to bounce. In the 1800s, a group of men wrongfully sold cucumbers marked as pickles. To right this wrong, officials declared that a pickle is legitimate only if it bounces. Modern Connecticut state law still holds that a legally labeled pickle must be able to bounce.

**15. ZEN PROVEN TEACHINGS TO LIVE BY:** Never, under any circumstances, take a sleeping pill and a laxative on the same night.

**16. PONDERISMS:** Why do people pay to go up tall buildings and then put money in binoculars to look at things on the ground?

**17. TODAY IN HISTORY:** In 1819, United States passed its 1<sup>st</sup>

immigration law.

**18. 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.

**19. 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>.

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