CYPEN & CYPEN

NEWSLETTER

for

July 6, 2017

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

1. FLORIDA SUPREME COURT STRIKES DOWN UNILATERAL REDUCTIONS IN PENSION AND WAGE BENEFITS FOR VIOLATION OF CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY: In the summer of 2010, the City of Miami, faced with a budget crunch, used a little known provision of the state

bargaining law called the “Financial Urgency” statute. The law allowed a public employer with serious financial troubles to accelerate the bargaining process. If the parties were at an impasse after that accelerated period, then the contract could be resolved in accordance with the impasse resolution process. Rather than follow that process, Miami simply altered the collective bargaining agreements, substantially cutting wages and benefits. The unions filed unfair labor practices, which were dismissed, and the dismissal was upheld by the District Court of Appeals. At the same time, the City of Hollywood, did something similar. The state labor board also ruled against the union, but a different District Court of Appeal ruled for the union, finding the City of Hollywood had violated the constitutionally protected contract rights and bargaining rights of the employees. Because of a conflict between two appellate courts, the Florida Supreme Court agreed to review the case. In a long awaited decision, the Supreme Court agreed with the unions. Florida is one of only a handful of states where collective bargaining for public workers is in the state constitution. The Supreme Court held that the actions of the cities violated the fundamental rights of contract and the right to meaningful collective bargaining. The Court held that constitution was a limit on the power of government and the cities had exceed that limit. The decision invalidated the actions taken and has left the crisis cities facing substantial damage claims for back pay and pension benefits. *Walter E. Headley Miami FOP Lodge 20 v. City of Miami*, 215 So. 3d 1 (Fla. 2017) [Ed. note, our colleague Adam Levinson is responsible for primary authorship of this item.]

2. POLICE OFFICERS' BILL OF RIGHTS PREEMPTS CITIZEN REVIEW BOARDS: Over forty years ago the Florida Legislature enacted the Law Enforcement Officers' Bill of Rights (LEOBR). Similar statutory protections apply to firefighters. Approximately fifteen states have adopted their own version of a LEOBR, which generally extends procedural protections to public safety officers in connection with departmental investigations. More recently, cities and civil rights organizations have advocated for independent review and citizen oversight of police departments. High profile police shootings have elevated these tensions nationally. In the case of *D'Agastino v. City of Miami* the Florida Supreme Court was presented with a conflict between the unambiguous longstanding protections in the LEOBR and the ability of the City of Miami's Citizen Investigative Panel (CIP) to subpoena police officers after an inconclusive internal investigation. Lower courts had interpreted the LEOBR as providing the exclusive method to interrogate a police officer. Yet, the City of Miami advanced the argument that the LEOBR only applied to "internal" police investigations, not external citizen review boards. Interestingly, the case originally arose in 2009, but sat before a lower court on rehearing for three years. Recognizing the complexities and difficulties inherent in law enforcement work, the Florida Supreme Court began its analysis by emphasizing that the policy and wisdom of citizen investigative panels was not before the court. Rather, the Court narrowly framed the issue as whether the Florida LEOBR has "preemptive force" with regard to the activities of citizen review

panels. Pointing to a legislative intent and history of directing disciplinary complaints exclusively to police departments, not outsiders, the Court held that the explicit statutory protections for police officers preempt the ability of a citizen review board to subpoena officers. According to the Court, any other result would render the meaningless the detailed rights conferred to police officers. In other words, if civilian review boards were given the authority to interrogate officers, this would provide a mechanism to circumvent the LEOBR. Indeed, the Court reasoned that the power to issue and enforce a subpoena is among the most powerful tools that a government may wield. The unanimous opinion avoided addressing the other functions of citizen review boards. The limited holding does not preclude future challenges if a citizen review board intrudes on the field of police discipline. The Court also pointed out that police officers remain exposed to public scrutiny and investigation by their own agency, internal affairs, the State Attorney, the FBI, the United States Department of Justice and the Criminal Justice Standards and Training Commission. Several *amici* briefs were submitted in the case, which lasted over eight years. *D'Agastino v. City of Miami,* No. SC 16-645 (Fla. June, 22, 2017). [Ed. note, our colleague Adam Levinson is responsible for primary authorship of this item.]

3. THE U.S. SUPREME COURT AGREES TO TIME LIMITS FOR INVESTORS' INDIVIDUAL CLAIMS IN RECOVERY OF SECURITIES DAMAGES CASES: Section 11 of the Securities Act of 1933 gives purchasers of securities "a right of action against an issuer

or designated individuals", (including security's underwriters, for any material misstatements or omissions in a registration statement. Section 13 provides two time limits for §11 suits. The first sentence states that an action "must be brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence…." The second sentence provides that "[i]n no event shall any such action be brought…more than three years after the security was *bona fide* offered to the public. In 2007 and 2008, Lehman Brothers Holdings Inc. raised capital through several public securities offerings. Petitioner, the largest public pension fund in the country, purchased some of those securities; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. In 2008, a putative class action was filed against respondents in the Southern District of New York. The complaint raised §11 claims, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. Because the complaint was filed on behalf of all persons who purchased the identified securities, petitioner was a member of the putative class. In February 2011, more than three years after the relevant securities offerings, petitioner filed a separate complaint against respondents in the Northern District of California, alleging violations identical to those in the class action on petitioner's own behalf. Soon thereafter, a proposed settlement was reached in the putative class action, but petitioner opted out of the class.

Respondents then moved to dismiss petitioner's individual suit, alleging that the §11 violations were untimely under the 3-year bar in the second sentence of §13. Petitioner countered that the 3-year period was tolled during the pendency of the class-action filing. The trial court disagreed, and the Second Circuit affirmed, holding that the tolling principle is inapplicable to the 3-year bar. It also rejected petitioner's alternative argument that the timely filing of the class action made petitioner's individual claims timely as well. The U.S. Supreme Court held that Petitioner's untimely filing of its individual complaint more than three years after the relevant securities offering is ground for dismissal. Section 13's 3-year time limit is a statute of repose not subject to equitable tolling. There are two categories of statutory time bars: statutes of limitations and statutes of repose, and each have a distinct purpose. Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims, while statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time. For this reason, statutes of limitations begin to run when the cause of action accrues, while statutes of repose begin to run on the date of the last culpable act or omission of the defendant. The decision was 5 to 4, with new Justice Gorsuch joining in the majority. Justice Ginsberg filed a dissenting opinion. *California Public Employees' Retirement System v. ANZ Securities, Inc.,* No. 16-373 (U.S. June 6, 2017).

4. PERSONS WITH A DISABILITY; LABOR FORCE

CHARACTERISTICS: In 2016, 17.9 percent of persons with a disability were employed, the U.S. Bureau of Labor Statistics reported. In contrast, the employment-population ratio for those without a disability was 65.3 percent. The employment-population ratio for both persons with and without a disability increased from 2015 to 2016 (by 0.4 percentage point for persons with a disability and by 0.3 percentage point for persons with no disability). The unemployment rate for persons with a disability, at 10.5 percent, was little changed from the previous year, while the rate for those without a disability declined to 4.6 percent. The data on persons with a disability are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 households that provides statistics on employment and unemployment in the United States. The collection of data on persons with a disability is sponsored by the Department of Labor's Office of Disability Employment Policy. Here are highlights from the 2016 data:

• Nearly half of all persons with a disability were age 65 and over, about three times larger than the share of those with no disability.
• For all age groups, the employment-population ratio was much lower for persons with a disability than for those with no disability.
• For all educational attainment groups, jobless rates for persons with a disability were higher than those for persons without a disability.
• In 2016, 34 percent of workers with a disability were employed part time, compared with 18 percent for those with no disability.
• Employed persons with a disability were more likely to be self-

employed than those with no disability.

5. OPINION: HEDGE FUNDS ARE NO PLACE FOR PUBLIC PENSION INVESTMENTS: In 2016, for the eighth consecutive year, the average hedge fund trailed the return of the benchmark S&P 500 index, according to Leland Faust writing in the San Francisco *Chronicle*. That underperformance has averaged more than 5 percent each year. But that did not stop the top-paid hedge fund managers from raking it in, regardless of their fund's poor performance. Last year, the 10 highest-paid hedge fund managers received annual compensation averaging about $765 million. Why should we care if a few hedge fund managers get fabulously wealthy by seducing the rich to part with their money? If that were the only problem, then we could look elsewhere for reform. But these folks are ripping off hard-working middle-class Americans. More than half of the $3 trillion held in hedge funds nationwide is pension fund and retirement plan investments. When the managers rake in excessive fees while their funds perform poorly, then either pension benefits will shrink or, in the case of public funds, taxes will be raised to make up the shortfall in the promised pensions. Over the past eight years, by the writer's estimate, pension plans have cumulatively lost about $600 billion compared with what they could have earned by passive (unmanaged) investment. That is a lot, and that is why he pleaded with the Board of Directors of the San Francisco Employees' Retirement Fund to abandon its misguided policy of investing in hedge funds. The leader of the top-paid hedge-fund managers pack, took home $1.6 billion in compensation. One of

his public funds gained 21.5 percent to beat the S&P index return of about 12 percent, while his other public fund returned 11 percent. No. 2, took home $1.4 billion. This is despite the fact that his largest fund, Pure Alpha (with assets of about $62 billion), returned 2.4 percent for 2016. The compensation to the remaining top-paid managers came from many funds that underperformed. Shakespeare asked, what is in a name? Well, if the name is “hedge fund manager,” the answer is a lot. Just calling oneself a “hedge fund manager” apparently magically entitles that person to compensation far above what any investment adviser or money manager earns. Just to keep these compensation figures in perspective, the cumulative pay of these top 10 guys was about $7.6 billion, or more than the combined salaries of every professional football and basketball player in the country. This exceeded the combined compensation of the CEOs of all of the S&P 500 companies. For the most part, hedge fund managers are able to collect this outsize compensation because they have convinced people that they possess special proprietary knowledge that will translate into higher returns. They clearly get an A+ for their ability to attract money and siphon off significant portions for their own benefit. But just as clearly they fail to provide adequate returns for their investors. How long do hedge funds need to underperform before pension funds (both public and private) stop throwing money at them? When will hedge fund investors wake up and see that the managers’ compensation is no match to their management performance? Common sense would tell us this arrangement should have ended years ago. But it is easy to be drawn in when pension fund trustees

are investing other people's money. The lust for imagined riches and the desire to be part of the special fraternity who can invest with a celebrity hedge fund manager are just too much for logic to overcome. Unless the public wakes up and tells pension fund trustees and others deciding how to invest their retirement funds that these are unsuitable investments, hedge funds will continue to be a fabulous idea for their managers and a poor investment for the investors.

6. *ERRATUM* IN ISS-SECURITIES CLASS ACTION SERVICES REPORT: In our June 29, 2017 Newsletter item #6, we reported that 12 of the top 100 settlements were in 2016, resulting in the largest settlement fund in any single year. The report should have said 13, rather than 12. For the sake of accuracy, we are reporting the correct number, according to *Recovery Max*, www.issgovernance.com/securities-class-action-services/recovermax-monitor/.

7. 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.

8. CRAZY STATE LAWS: *Good Housekeeping* reminds us that there are crazy laws in every state. In Montana it is illegal to give a rat as a present. For many reasons, we sure hope a rat is not on your Christmas list. In Montana, it is also unlawful to raise rats except as

food for reptiles, birds of prey or both.

9. CYNICAL THINKING: I want to die peacefully in my sleep, like my grandfather. Not screaming and yelling like the passengers in his car.

10. PONDERISMS: My idea of housework is to sweep the room with a glance.

11. OLD CEMETERIES & EPITAPHS: A truly happy person is one who can enjoy the scenery on a detour and one who can enjoy browsing old cemeteries. For example, here lies the body of John Round. Lost at sea and never found.

12. TODAY IN HISTORY: On this day in 1776 *Pennsylvania Evening Post* of prints the first newspaper rendition of the Declaration of Independence, and in 1983 the Supreme Court rules retirement plans cannot pay women less than men.

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.