



CYPEN & CYPEN

NEWSLETTER

for

June 8, 2017

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

1. PAID FAMILY LEAVE IN THE U.S.: Congressional Research Service has released its analysis entitled *Paid Family Leave In the United States*. Paid family leave (PFL) refers to partially or fully compensated time away from work for specific and generally significant family caregiving needs, such as the arrival of a new child or serious illness of a close family member. Although the Family and Medical Leave Act of 1993 (FMLA; P.L. 103-3) provides eligible

workers with a federal entitlement to unpaid leave for a limited set of family caregiving needs, no federal law requires private-sector employers to provide *paid leave* of any kind. Currently, employees may access paid family leave if offered by an employer. In addition, workers in certain states may be eligible for state family leave insurance benefits that can provide some income support during periods of unpaid leave. As defined in state law and federal proposals, family caregiving activities that are eligible for PFL or family leave insurance generally include caring for and bonding with a newly arrived child and attending to serious medical needs of certain close family members. Some permit leave for other reasons, but in practice, day-to-day needs for leave to attend to family matters (e.g., a school conference or lapse in child care coverage), minor illness and preventative care are not included among “family leave” categories. Employer provision of PFL in the private sector is voluntary. According to a national survey of employers conducted by the Bureau of Labor Statistics, 13% of private-industry employees had access to PFL through their employers in March 2016. The availability of PFL was more prevalent among professional and technical occupations and industries, high-paying occupations, full-time workers and workers in large companies (as measured by number of employees). Recent announcements by several large companies indicate that access may be increasing among certain groups of workers. In addition, some states have enacted legislation to create state paid family leave insurance (FLI) programs, which provide cash benefits to eligible workers who engage in certain caregiving activities. California, Rhode

Island and New Jersey currently operate FLI programs, which offer four to six weeks of benefits to eligible workers. The New York program will begin implementation in 2018. The District of Columbia FLI legislation took effect in April 2017, with benefits payable starting in 2020. Implementation of Washington State's program is delayed until a financing mechanism is identified. Many advanced-economy countries entitle workers to some form of paid family leave. Whereas some provide leave to employees engaged in family caregiving (e.g., of parents, spouses, and other family members), many emphasize leave for new parents, mothers in particular. The United States is the only OECD member to not offer paid leave to new mothers. The 115th Congress is considering proposals to expand national access to paid family leave. Key bills include the Family and Medical Insurance Leave Act (FAMILY Act; S. 337/H.R. 947), which proposes to create a national wage insurance program for persons engaged in family caregiving activities or who take leave for their own serious health condition, and the Strong Families Act (S. 344), which would provide tax incentives to employers to voluntarily offer paid family and medical leave to employees. For your information, Congressional research service has been informing the legislative debate since 1914. [CRS Report R44835 (May 24, 2017)].

2. ANOTHER BIG COMPANY BANS TELECOMMUTING: IBM joins a handful of companies that have backtracked on the movement to allow employees to work from home, according to www.todaysgeneralcounsel.com. While the number of such

companies is not large, the number of employees affected has been significant. IBM did not say how many of its 380,000 workers are affected, but the order that was handed down – essentially to quit working out of your home office or resign – applies to some major company divisions that employ tens of thousands of workers. While IBM is not the first company to rescind telework arrangements, it may be the first time a company that sells telework software has asked many of its remote employees to start working in its offices again. Among companies that have made a similar move are Yahoo – where there was pushback from young employees – and Hewlett-Packard, Best Buy, Bank of America Corp. and Aetna, Inc., where the policy went down relatively easily.

3. STATE PENSION FUNDS PAYING FOR INCREASED

ALTERNATIVES ALLOCATIONS: *Pensions and Investments* reports that U.S. state pension plans have increased their allocations to alternatives in recent years in an effort to reach their assumed rates of returns, but the move to more complex investment vehicles has come with a dramatic increase in fees, according to a report from Pew Charitable Trusts. For fiscal year 2014, the average public pension plan allocation to alternatives was 25%, more than double the 11% allocation in fiscal year 2006, the report said. That hike in alternatives has increased external management fees for public pension funds considerably, rising as a percentage of total assets to 0.34% in fiscal year 2014, compared with 0.26% in fiscal year 2006. Of the 73 plans, the \$9 billion Arizona Public Safety Personnel Retirement System,

had the highest allocation to alternatives in fiscal year 2014, at 56%, and the highest external management fees, at 2% of total assets. Although the increase may seem small, it equates to over \$2 billion (more) in total annual investment fees for the 73 plans examined. During the same time period, the average allocation to equities dropped to 51% from 61% and the allocation to fixed income dropped to 24% from 28%. Of the 73 state plans analyzed by Pew, 21 plans had at least 30% of their portfolios in alternatives, and five plans had more than 40% in alternatives. The 73 plans represent assets totaling \$2.8 trillion.

4. GRIDLOCKED MIAMI RANKS SECOND ONLY TO LOS

ANGELES IN TRAFFIC RANTS ON INSTAGRAM: The Miami *Herald* reports that when Miami drivers are stuck in traffic, they vent on Instagram, and the volume of their complaints ranks second only to gridlocked Los Angeles among frustrated U.S. drivers. The greater Miami/Miami Beach area recorded 928 posts per 100,000 residents, 126,085 Instagram posts with the hashtags #Traffic, #TrafficSucks and #TrafficJam by the Auto Insurance Center. Los Angeles/Santa Monica ranked first with 993 posts. Atlanta was a distant third with 584; San Francisco was fourth with 484 and New York City was fifth with 249. Seattle, Boston, Washington, D.C., Orlando and Las Vegas rounded out the top 10. The study also looked at where the posts were clustered. The Miami hotspots were downtown, in the southern half of Miami Beach and on the 836 expressway west of the Palmetto expressway. In L.A., most posts originated from portions of four of the

world's most-congested freeways on the 101, the 5, the 10 and the 405. Time stamps on the posts indicated that the heaviest day for complaints was Friday, usually late afternoon, when tensions boil over at the end of the work week and everyone just wants to get home. Sunday had the fewest. The worst months nationally were February and October, and April was the lightest. Washington, D.C., had the most complaints by state (if you want to call the District a state) with 221 per 100,000 residents, followed by New York (138), California (95), Nevada (85), Wyoming (71) and Florida (45). The average American commuter spends 50 hours per year stuck in traffic. But major metro areas are much more miserable. Los Angeles commuters endure an average of 81 hours per year in traffic jams, with D.C., San Francisco, Houston and New York in the 70s. In another study, Miami ranked sixth in congestion in the 2017 Traffic Index by TomTom, a navigation and mapping company. Miami's score reflected a 2 percent increase from 2016. Los Angeles was No. 1, followed by San Francisco, New York, Seattle and San Jose. Portland, Honolulu, Washington, D.C., and Boston rounded out the top 10 as most congested cities. Traffic has a significant impact on our quality of life and local economy. With that in mind, Miami-Dade has focused on improving mobility by investing in infrastructure and new technologies designed not only to improve traffic conditions, but also give priority to our transit vehicles, which transport thousands of our residents and visitors every day. Among the measures the county is implementing: technology along 12 of the busiest corridors to adjust signal timing to demand; the Strategic Miami Area Rapid Transit Plan (SMART Plan)

to expand public transit into six rapid transit corridors, supported by an express bus network; real-time tracking of the Metrobus, Metrorail and Metromover fleet with an upgraded tracker app for riders, and modernization of trains and buses. Americans drove a record 3.15 trillion miles last year, according to federal estimates. How can we avoid the congestion, clear the roads and get moving again? There are plenty of suggestions — like making cities more bicycle-friendly, having better public transportation and charging peak-hour tolls. At least we have Instagram to let off some steam. And driverless cars are projected to roll out in 2020 or 2021, with the hope that they will reduce congestion. Car-bound Miamians can take some solace in the fact that they are not driving in L.A. or in London, where commuters spent 101 hours — or 2 ½ work weeks — simmering in traffic delays last year.

5. UNITED STATES SUPREME COURT INVALIDATES

“PROVOCATION RULE”: The Los Angeles County Sheriff’s Department received word from a confidential informant that a potentially armed and dangerous parolee-at-large had been seen at a certain residence. While other officers searched the main house, Deputies Conley and Pederson searched the back of the property where, unbeknown to the deputies, respondents Mendez and Garcia were napping inside a shack where they lived. Without a search warrant and without announcing their presence, the deputies opened the door of the shack. Mendez rose from the bed, holding a BB gun that he used to kill pests. Deputy Conley yelled, “Gun!” and the

deputies immediately opened fire, shooting Mendez and Garcia multiple times. Officers did not find the parolee in the shack or elsewhere on the property. Mendez and Garcia sued Deputies Conley and Pederson and the County under 42 U.S.C. § 1983, pressing three Fourth Amendment claims: a warrantless entry claim, a knock-and-announce claim, and an excessive force claim. On the first two claims, the District Court awarded Mendez and Garcia nominal damages. On the excessive force claim, the court found that the deputies' use of force was reasonable, held them liable nonetheless under the Ninth Circuit's provocation rule, which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer intentionally or recklessly provokes a violent confrontation and (2) the provocation is an independent Fourth Amendment violation. On appeal, the Ninth Circuit held that the officers were entitled to qualified immunity on the knock-and-announce claim, that the warrantless entry violated clearly established law. It also affirmed the District Court's application of the provocation rule, and held, in the alternative, that basic notions of proximate cause would support liability even without the provocation rule. SCOTUS held that The Fourth Amendment provides no basis for the Ninth Circuit's "provocation rule." The provocation rule is incompatible with SCOTUS' excessive force jurisprudence, which sets forth a settled and exclusive framework for analyzing whether the force used in making seizures complies with the Fourth Amendment. The operative question in such cases is whether the totality of the circumstances justifies a particular sort of search or seizure. When an officer carries out a seizure that is reasonable, taking into account all

relevant circumstances, there is no valid excessive force claim. The provocation rule, however, instructs courts to look back in time to see if a *different* Fourth Amendment violation was somehow tied to the eventual use of force, an approach that mistakenly conflates distinct Fourth Amendment claims. The proper framework is set forth above. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately. There is no need to distort the excessive force inquiry in this way in order to hold law enforcement officers liable for the foreseeable consequences of all their constitutional torts. Plaintiffs can, subject to qualified immunity, generally recover damages that are proximately caused by any Fourth Amendment violation. Here, if respondents cannot recover on excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry. The Ninth Circuit's proximate-cause holding is similarly tainted. Its analysis appears to focus solely on the risks foreseeably associated with the failure to knock and announce—the claim on which the court concluded that the deputies had qualified immunity rather than the warrantless entry. On remand, the court should revisit the question of whether proximate cause permits respondents to recover damages for their injuries based on the deputies' failure to secure a warrant at the outset. *County of Los Angeles v. Mendez*, No. 16-369 (US, May 30, 2017).

6. WHAT EVERY WOMAN SHOULD KNOW ABOUT SOCIAL SECURITY: Retirement planning is especially challenging for women. We tend to live longer, and it is not uncommon to have “off-

ramped” from work at some point to raise kids or care for a loved one. And because this affects lifetime earnings, it may also affect your eventual Social Security benefit. Here is what women need to understand about Social Security. You can claim a benefit based on your own work history, or you may be able to claim a benefit based on your spouse’s Social Security earnings record. You are eligible for Social Security if you have worked (and paid into the system) for 40 quarters, which is 10 years. Your benefit is based on the highest 35 years of earnings. That is where working through your 60s might be helpful, if it knocks out some of your lower-income years from your benefit computation. If you are eligible for benefits based on your own work, and also benefits based on someone else’s work, such as your spouse, you will get your own benefit first. If the benefit you are eligible for based on someone else’s work is higher than your own, you will get a combination of the two that equals the higher amount. If you were married at least 10 years before you divorced or if your marriage ended in death, you may be eligible to claim a benefit based on your former or deceased spouse’s Social Security record.

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 the State of Michigan do not even

think about selling your vehicle on a Sunday. It is unlawful to sell, trade or buy motor vehicles on a Sunday in Michigan, due to religious reasons. According to the Wolverine State, time is better spent with family, friends or at church.

9. ZEN PROVEN TEACHINGS TO LIVE BY: The quickest way to double your money is to fold it in half and put it back in your pocket.

10. PONDERISMS: “I am” is reportedly the shortest sentence in the English language. Could it be that “I do” is the longest sentence?

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, Anna Hopewell's grave in Enosburg Falls, Vermont reads: Here lies the body of our Anna, done to death by a banana. It was not the fruit that laid her low, but the skin of the thing that made her go.

12. TODAY IN HISTORY: On this day in 1982, Leroy Satchel Paige, US baseball pitcher, dies at 75.

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>.

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