



CYPEN & CYPEN
NEWSLETTER
for
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Stephen H. Cypen, Esq., Founding Editor
Robert D. Klausner, Esq., Senior Editor

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

1. MILLIMAN REPORTS AN UPDATE ON RETIREMENT PLAN CHOICES FOR PUBLIC EMPLOYEES AND EMPLOYERS: The National Institute on Retirement Security reports that Defined benefit (DB) pension plans are designed to provide employees with a predictable monthly benefit for life when they retire. The amount of a

monthly pension is typically a function of the number of years an employee devotes to their job and the worker's pay, usually at the end of his career. This plan design is attractive to employees because of the financial security it provides. Employees know they will have a steady, predictable income that will enable them to maintain a stable portion of their pre-retirement income. DB plans are pre-funded retirement systems. That is, employers—and, in the public sector, employees—make contributions to a common pension trust fund over the course of each employee's career. These funds are invested by professional asset managers whose activities are overseen by trustees and other fiduciaries. The earnings that build up in the fund, along with the dollars contributed while working, pay for the lifetime benefits an employee receives when he or she retires. Defined contribution (DC) plans, such as 401(k) plans, function very differently than DB plans. First, there is no implicit or explicit guarantee of a certain level of retirement income in a DC plan. Rather, employees and sometimes employers contribute to the plan over the course of a worker's career. Whether the funds in the DC account will ultimately be sufficient to meet retirement income needs will depend on a number of factors, such as the level of employer and employee contributions to the plan, the investment returns earned on assets, whether loans are taken or funds are withdrawn prior to retirement and the number of years a retiree will live after they leave work. DC plans consist of separate, individual accounts for each participant. Plan assets are typically "participant directed," meaning that each individual employee can decide how much to save, how to invest the

funds in the account, how to modify these investments over time and how to withdraw the funds at retirement. Along with differences in contributions and investments during employees' careers, another important difference between DC and DB plans becomes apparent at retirement. Unlike in DB plans, where retirees are entitled to receive regular, monthly pension payments for life, in DC plans it is typically left to the retiree to decide how to spend down one's retirement savings. Research suggests that many individuals struggle with this task. Since retirees find it difficult to estimate how long they will live, they either draw down funds too quickly and run out of money, or hold onto funds too tightly and self-impose a lower standard of living as a result. In theory, employers that offer DC plans could provide annuity payout options, but in practice they rarely do. Unlike employees in the private sector, who have seen a drastic decrease in DB plan coverage, most public employees still participate in a DB plan. For example, a comparison of a 2008 report from the Bureau of Labor Statistics (BLS) with the 2016 National Compensation Study (NCS) shows that private sector participation in DB plans dropped substantially from 76 percent of full time employees in 1986 to 15 percent in 2016, yet public employee participation in DB plans only dropped from 93 percent of full time employees in 1986 to 75 percent in 2016. Thus, while private sector DB coverage has declined sharply in the last three decades, public sector coverage has declined modestly; as most state and local government employees still provide DB pension coverage to their employees. A few states offer public employees a choice between a traditional DB pension and a DC

account as the primary retirement plan.

2. BEWARE OF FAKE CHARITY SCAMS RELATING TO

HURRICANE HARVEY: The Internal Revenue Service today issued a warning about possible fake charity scams emerging due to Hurricane Harvey and encouraged taxpayers to seek out recognized charitable groups for their donations. While there has been an enormous wave of support across the country for the victims of Hurricane Harvey, people should be aware of criminals who look to take advantage of this generosity by impersonating charities to get money or private information from well-meaning taxpayers. Such fraudulent schemes may involve contact by telephone, social media, e-mail or in-person solicitations. Criminals often send emails that steer recipients to bogus websites that appear to be affiliated with legitimate charitable causes. These sites frequently mimic the sites of, or use names similar to, legitimate charities, or claim to be affiliated with legitimate charities in order to persuade people to send money or provide personal financial information that can be used to steal identities or financial resources. IRS.gov has the tools people need to quickly and easily check the status of charitable organizations. The IRS cautions people wishing to make disaster-related charitable donations to avoid scam artists by following these tips:

- Be sure to donate to recognized charities.
- Be wary of charities with names that are similar to familiar or

nationally known organizations. Some phony charities use names or websites that sound or look like those of respected, legitimate organizations. The IRS website at IRS.gov has a search feature, [Exempt Organizations Select Check](#), through which people may find qualified charities; donations to these charities may be tax-deductible.

- Don't give out personal financial information — such as Social Security numbers or credit card and bank account numbers and passwords — to anyone who solicits a contribution. Scam artists may use this information to steal a donor's identity and money.
- Never give or send cash. For security and tax record purposes, contribute by check or credit card or another way that provides documentation of the donation.

Consult IRS [Publication 526](#), Charitable Contributions, available on IRS.gov. This free booklet describes the tax rules that apply to making legitimate tax-deductible donations. Among other things, it also provides complete details on what records to keep.

3. CITY OF CHICAGO AND CITY OF PHILADELPHIA ARRIVE AT DIFFERENT CONCLUSIONS FOR LIABILITY FOR AFTER-HOUR SMART-PHONE USED BY PUBLIC SAFETY EMPLOYEES

A. The City of Chicago lacked either actual or constructive knowledge

that members of the Chicago Police Department were performing after-hours work on their smartphones, the Seventh Circuit Court of Appeals has ruled, affirming a trial court's earlier ruling that the City was not liable for this work under the Fair Labor Standards Act. *Allen v. City of Chicago*, Case No. 16-1029 (7th Cir. Aug. 3, 2017). Here's the background: Current and former members of the Chicago Police Department's Bureau of Organized Crime alleged they were owed overtime pay for time spent after normal work hours monitoring and responding to emails on their BlackBerrys. Although during a bench trial the court found that the plaintiff-employees in fact responded to email as alleged and that the time they spent on such activity was substantial enough to otherwise constitute compensable "work," the trial court nevertheless held the City was not liable for the uncompensated hours because the plaintiffs failed to prove the Bureau had actual or constructive knowledge the work had been performed. *Allen v. City of Chicago, supra*. On appeal, the Court of Appeals echoed the findings of the trial court. It noted that while generally "[e]mployers must pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work," this mandate "stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." Thus, while an employer may be deemed to have had constructive knowledge of, and therefore liability for, unreported work being performed by its employees "if it should have acquired knowledge of that work through reasonable diligence," that standard asks what the employer reasonably *should*

have known, not what it theoretically *could have* known. In this case, the Bureau had a formal procedure for obtaining overtime compensation, which the officers regularly used. Moreover, while some plaintiffs testified that notwithstanding the Bureau's policy, its "culture" would frown on submitting overtime request slips premised on BlackBerry use, other plaintiffs had submitted requests on this very basis and were paid accordingly. In addition, while certain guidelines issued by the Chicago Police Department suggested that off-duty smartphone use would only be compensated under limited circumstances and with advance approval, in practice these guidelines were neither followed by the officers nor enforced by their supervisors. Thus, agreeing with the trial court, the Court of Appeals concluded the plaintiffs had failed to demonstrate an unwritten policy existed to deny them compensation for off-duty BlackBerry work. The Seventh Circuit's decision reminds employers that a plaintiff under the FLSA must demonstrate more than having performed the unreported "work" in question; the Act further requires the plaintiff to prove that his employer had knowledge, actual or constructive, of that work. To that end, policies requiring employees to report all hours worked, including work performed off site or after regular hours, can be helpful (but may not be dispositive in defending against such claims). We found this case in JacksonLewis' blog.

B. According to Firefighterovertime.org, the City of Philadelphia just agreed to pay police officers approximately \$8 million dollars to do just that. The Fraternal Order of Police filed a complaint alleging the City

required officers to frequently check phones and email while “off-duty”. The officers argued requiring them to regularly check and respond to department calls and emails while “off-duty” should be considered “on-call” time and should be paid. The city agreed to settle the officer’s claims by paying officers approximately \$1,300 each. Whether “on-call” time should be compensated under the FLSA depends on numerous factors. These factors can include:

- Level of employer control over the on-call time
- Geographical limits on the employee’s activities while on call
- Frequency of calls
- Discipline for employees that miss a call back
- Agreement between employer and employees

On-Call cases can be highly fact specific. It is very difficult to find the same set of facts and circumstances in different cases. A careful analysis of many factors is required to determine if “on-call” time needs to be compensated. Additionally, state laws and local ordinances may also be relevant. Very often state wage and hour laws place additional restrictions on employers that want to use on-call time. Whether this Pennsylvania case will create a ripple effect throughout the region is yet to be determined.

4. THOSE NOT SAVING IN 401(K) CHALLENGED BY DAY-TO-DAY FINANCES: Everyday money matters are dramatically impacting the lives and retirement saving efforts of Americans,

according to a survey from Schwab Retirement Plan Services, explains Plansponsor.com. The nationwide survey of 1,000 workers with access to a 401(k) plan—half of whom are actively contributing to it (“savers”) and half of whom are not (“non-savers”)—reveals that 60% of savers and 53% of non-savers who have at one time contributed to a 401(k) say their 401(k) is their largest or only source of retirement savings. Workers in the survey identified a number of sources of financial stress, with non-savers naming present-day challenges in far greater numbers than their saving peers. More than twice as many non-savers as savers say keeping up with monthly expenses is a significant source of stress (42% compared to 20%). Forty-five percent of non-savers say they either have no money left over or are actually behind on bills at the end of each month, compared to 23% of 401(k)-savers who say the same. When asked about their primary obstacles to saving for retirement, non-savers focused on immediate concerns including: needing to pay basic monthly bills (46%), paying off credit card debt (42%), covering unexpected expenses like home repairs (34%) and paying medical bills (33%). Savers have similar concerns, but generally in smaller numbers: unexpected expenses (36%), monthly bills (31%), being unwilling to sacrifice things that add to their quality of life (29%) and credit card debt (29%) top their list. In hindsight, non-savers recognize the impact that debt is having on their ability to save. When asked to select the one thing they would change about the way they managed their finances in the past, 26% of non-savers say they would have accumulated less debt, compared to just 13% of savers. The survey

reveals a substantial gap in the way 401(k)-savers and non-savers perceive their overall financial health. Eighty-five percent of savers say they are in pretty good shape or very good shape financially, compared to 64% of non-savers. Two-thirds (66%) of savers say they have increased their 401(k) contribution percentage in the past two years, and 62% say they believe they are saving enough to retire when they want to. Outside of 401(k) plans, savings accounts and IRAs are the most common methods of saving for retirement. Fifty-six percent of savers have a savings account, and 47% have an individual retirement account (IRA). Forty-four percent of non-savers have a savings account, and 23% have an IRA. However, more than one-quarter of non-savers (26%) are not currently saving or investing for retirement at all.

5. OLDER WORKERS MORE LIKELY TO DECREASE

RETIREMENT SAVINGS: Plansponsor.com again reports that nearly one-quarter, 23%, of working Americans increased their retirement savings contributions this year, the highest reading in six years of polling, according to Bankrate.com. However, 16% are saving less, and 5% are not saving at all. In 2011, only 15% increased their retirement savings contributions, and 29% cut them. Working Americans are increasing their retirement savings more and more as the economic recovery continues, whether saving the same percentage of higher earnings or a higher percentage of the same earnings, says Bankrate.com Chief Financial Analyst Greg McBride. Among households earning \$50,000 or more a year, 27% increased

their retirement savings. Among households earning less than \$50,000 a year, only 18% increased their retirement savings. Among households earning less than \$30,000 a year, 20% boosted contributions, but 22% scaled them back. A larger percentage of every age group younger than 63 increased their savings than decreased them, with Millennials, meaning those between the ages of 18 and 26, leading the way. Nearly one-third, 30%, of Millennials increased their retirement savings in the past year. Older workers, however, were more likely to have cut back on their contributions than increased them. Sixteen percent of older Boomers, meaning those 63 to 71, cut back on their savings, while 15% increased them. Forty-five percent of those in the Silent Generation, meaning those 72 and older, cut back on their retirement savings, while 13% increased them. Part-time workers were more likely to decrease contributions than full-time workers (33% versus 17%).

6. THE SWITCH TO 401k-TYPE PLAN FOR KENTUCKY PUBLIC EMPLOYEES WILL CAUSE MORE HARM:

Kentucky Center for Economic Policy, <http://kypolicy.org/dash/wp-content/uploads/2017/08/KY-DC-Report.pdf>, reports that Kentucky's public pension systems remain a critical concern for the state's policymakers. Taken as a whole, Kentucky's plans are one of the two worst-funded public pension systems in the country. In particular, the plan for most state employees (the Kentucky Employees' Retirement System (KERS) non-hazardous plan) is severely underfunded, possessing only 16 percent of the assets it needs to pay future

benefits — and even less under new assumptions the Kentucky Retirement Systems (KRS) board recently adopted. Governor Bevin says he plans to call a special session to address the issue. His administration has hired the consulting group PFM to do an analysis of the pension systems and develop recommendations. The special session comes on the heels of a budget in which the legislature made significant strides to better fund the plans. However, those additional dollars were possible only through deep cuts to other public services, and by relying substantially on one-time funds unlikely to be available next time around. Without generating more revenue, it will be extremely difficult for Kentucky to maintain its current level of payments and make other needed public investments critical to moving the state forward. The lack of funds is creating pressure for much-needed tax changes to generate additional revenue, but also for possible changes to pension benefits. However, Kentucky's large unfunded pension liability is for existing retirees and current employees, and those benefits are legally and morally obligated to them. The legislature clearly does have the authority to change benefits for new employees. But those workers do not add to the unfunded liability and, as shown in this report, have benefits whose cost to the state is already low. Costs are low in part because the General Assembly has already reduced benefits for new workers through several rounds of cuts in recent years. In 2008, the legislature cut benefits and required more years of service for retirement eligibility in the KRS and Teachers' Retirement System (TRS) plans. Starting in 2012, the state ended cost of living adjustments for state

worker retirees, and in 2013 the General Assembly moved new state and local employees into a hybrid cash balance plan that shifts risk to those workers. Despite prior cuts, one possible proposal under consideration involves ending the existing defined benefit (DB) plans and moving new employees into a 401k-style defined contribution (DC) plan. Governor Bevin said he intended to propose that change in a recent radio interview. As outlined in this report, however, a shift to a DC plan will not save money because its cost for new workers and teachers would be similar to the already-inexpensive defined benefit plans. In fact, closing the DB plans will increase the cost of paying off those plans' unfunded liabilities. At the same time, a shift to a less efficient DC plan will reduce the level of benefits workers receive for the same level of employer contribution, making it harder to attract and retain skilled public sector workers. That will increase employee turnover and the costs to recruit and train new workers while reducing the quality of public services. And it will result in an inferior retirement that will lower the quality of life for more of Kentucky's seniors and reduce the dollars circulating in the economy of every Kentucky community. Kentucky needs a responsible revenue and funding plan that allows the state to meet its obligations to existing retirees and current workers while also putting the dollars into its schools and other public services needed to make Kentucky a better state. Elected leaders should not make the existing situation worse by moving to an inefficient DC plan that adds new costs and results in other harmful consequences.

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 North Dakota, you cannot shoot fireworks after 11 p.m., as it is a violation of disturbing the peace. Fourth of July must be pretty tame in Devils Lake, North Dakota. However, you are safe to fire at 8:00 a.m. Fireworks and eggs, anyone?

9. CYNICAL THINKING: The pharmacist asked me my birth date again today. I am pretty sure she is going to get me something.

10. PONDERISMS: There are two kinds of pedestrians . . . The quick and the dead.

11. FUNNY TOMBSTONE SAYINGS: Some tombstones are clever and could make you die from laughter. For example, one tombstone reads: My mother-in-law's chicken really IS "to die for."

12. TODAY IN HISTORY: **On this day in 1997** Diana, Princess of Wales, dies in a car crash in a road tunnel in Paris.

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.

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