



CYPEN & CYPEN
NEWSLETTER
for
September 6, 2018

Copyright, 1996-2018, all rights reserved
Stephen H. Cypen, Esq., Founding Editor
Robert D. Klausner, Esq., Senior Editor

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

1. UNIONS OBJECT TO RECOUPING OVERPAYMENT OF PENSIONS FROM MEMBERS:

IFPTE Local 21, a union representing 11,000 scientists, engineers and other public-sector professionals in the Bay Area of California, has partnered with AFSCME Local 101 to protest the possibility that retirees will be asked to make up about \$1.5 million in overpayments due to a payment miscalculation. While Retirement Services discovered the

payment miscalculation in 2011, it did not stop overpayments to retirees, nor was notice given to any affected retirees that they may have received overpayments based on this error. Notice was finally made to retirees in April 2018, yet overpayments continue. The San Jose Retirement Board is considering its options, but one is to require full repayment of overpayments including interest per year by each retired employee or surviving beneficiary. IFPTE Local 21 member and Community Services Supervisor Olympia Williams said in a statement, "While mistakes happen when managing a large complex payment system, we expect a higher level of responsibility from the Director of our Retirement System. At no time should overpayments, that are now affecting widowers living on a partial fixed income, be hidden from potentially affected retirees, as what happened in this case. When the error was discovered, and you knew the cause of that error, it should have been possible to identify anyone who potentially could have been affected. This is the responsible and transparent thing to do. We will ask, as City of San Jose current employees, and future retirees, that the pension board mitigate the impact to those who were overpaid because of the 7-plus years of lack of notification." *Plansponsor Staff*, August 20, 2018.

2. CORPORATE DB FUNDED STATUS ROSE TO 93.4% IN JULY:

The funded ratio of the 100 largest US corporate defined benefit pension plans rose to 93.4% in July from 92.7% at the end of June, and 85.8% at the same time last year due to a strong investment performance during the month, according to consulting firm Milliman. The aggregate deficit for the plans fell to \$108 billion from \$120 billion, while the market value of their assets increased \$13 billion to \$1.537 trillion from \$1.524 trillion at the end of June due to a 1.15% investment gain for the month. The funded status improvement was partially offset by pension liability increases, which was a result of a small decrease in the benchmark corporate bond interest rates used to value pension liabilities. The 93.4% funded ratio is the highest the Milliman 100 Pension Funding Index has reached since the fourth quarter of 2008, when discount rates were significantly higher than they are today, according to Milliman. For the 12 months to the end of July, the cumulative asset return for the pensions has been 5.4%, while the Milliman 100 PFI funded status deficit has improved by \$138 billion during that time. The improvement in the funded status deficit has been attributed to discount rates having risen to 4.11% at the end of July from 3.71% at the same time last year. Milliman said that if the plans were to achieve the expected 6.8% median asset return as forecast in its 2018 pension funding study, and if the current

discount rate of 4.11% were maintained during 2018 and 2019, the funded status of the surveyed plans would increase to 94.8% by the end of 2018, and 98.7% by the end of 2019. The firm said this would result in a projected pension deficit of \$85 billion by the end of 2018, and \$21 billion by the end of 2019. For its forecast, Milliman assumed 2018 aggregate contributions of \$48 billion, and 2019 aggregate contributions of \$52 billion. Milliman said that under an optimistic forecast with interest rates rising to 4.36% by the end of 2018 and 4.96% by the end of 2019, and annual asset gains of 10.8%, the funded ratio would climb to 99% by the end of 2018, and 115% by the end of 2019. However, under a pessimistic forecast with similar interest rate and asset movements (3.86% discount rate at the end of 2018 and 3.26% by the end of 2019, and 2.8% annual returns), the funded ratio would decline to 91% by the end of 2018, and 84% by the end of 2019. *Chief Investment Officer, August 17, 2018.*

3. AS A PROFESSIONAL FIDUCIARY, YOU MUST NEVER DO ANY OF THESE 7 THINGS:

As a driver, you must know how to operate a vehicle and you need to know the rules of the road. There is something else you need to know. These are not formal rules. They are warning signs. These are not the roads less traveled. These are the roads you should never travel (think “military testing area”). The same holds true for practicing fiduciaries. You have practical things you must know and common sense rules to follow, but then you also have places you never want to step into. Unlike many other professions, fiduciaries benefit most when they color within the lines. While other jobs reward those who think outside the box, rampant creativity often lands a fiduciary in trouble. In an industry where we find new and exotic investment offerings on a regular basis, maintaining the discipline to be boring can be a challenge. Unfortunately for the professional fiduciary, the real world is wrought with liability minefields. Straying off course even little bit can prove harmful. Now, we are not talking about the sort of “nevers” that apply to everyday life, as Travis T Sickle, CEO of Sickle Hunter Financial Advisors in Tampa, Florida, points out when he says never to “lie, cheat or steal.” That goes without saying. Neither are we referring to the broad (and perhaps most important) “never” which all fiduciaries have memorized, that is to never do “anything that does not put the client’s interest first,” as Robin Lee Allen, a Managing Partner at Esperance Private Equity in New York City, states. We want to focus on the type of “nevers” that, in the heat of the moment or humdrum routine of everyday life, fiduciaries can find themselves slowly sliding down that slippery slope towards. In fact,

if, as you read these, you catch yourself muttering something about “there is always an exception,” then you have just discovered where that slippery slope lies.

#1: Never Provide Legal Advice

You are smart. You know a lot of things. You have been around the block once or twice. All these factors sometimes compel you to say things you are never supposed to say. One of those “nevers” is offering legal advice. It goes without saying that, as you begin to accumulate years of experience, you learn how legal professionals respond in certain specific circumstances. It is very tempting to offer this “obvious” advice to a confused client. After all, is not in their “best interest” to avoiding wasting the time and paying the legal fees? Perhaps. But if you are not a lawyer and you start offering legal advice, you open yourself up to a whole lot of trouble. “Never provide legal advice (unless you are an attorney engaged in that capacity),” says John C. Hughes, an ERISA/benefits attorney with Hawley Troxell in Boise, Idaho. Whether it is advice on what type of personal trust is best suited for a particular situation or how to address ERISA compliance matters in corporate retirement plans, it is better to know how politely to advise the client to seek the counsel of a competent attorney.

#2: Never Get Emotionally Involved

You like your clients. You really do. And, as a fiduciary, you are always looking out for their best interests. It is not that different than a parent’s relationship with a child. Eventually, you begin to feel an obligation to please them, to enable them, to protect them from all the possible nastiness the world can throw at them. While others may be encouraged to bring passion to their job, fiduciaries risk much should they let emotions get the better of them. “A fiduciary should not get emotionally involved in decisions,” says Allison Grebe Lee, a Financial Planner/Trust Officer for Allen Trust Company in Portland, Oregon. “As the duty of the fiduciary is to protect the client’s interests, not provide for the wishes of the beneficiary(ies).” Never allow emotion to oblige you to tell a client “yes” when you know it is wrong.

#3: Never Violate Your Trust

Along these lines, it is critical to remember that clients hire fiduciaries because they trust those fiduciaries will say “no” when the time comes. Trust is the key word here. If it is not clear by now, you should be able to see how our first two “nevers” can place a fiduciary in

a position that compromises trust. Paramount above all else is preserving the trust in the relationship. This requires an open, honest and sometimes blunt dialogue. Laura French of the French Law Group, LLC in Conyers and Bogart, Georgia, says never to “break trust.” A fiduciary should be clear and direct with the beneficiary. Dancing around issues can lead to misunderstandings and will foster mistrust.

#4: Never Play Favorites

Again, we are building on the previous “nevers.” If fiduciaries are too afraid to say “no,” if they are not open and honest in their communication, they will find it difficult to make hard decisions in the case of multiple beneficiaries. This can involve a split-interest trust where one beneficiary receives investment income and another receives investment gains. Another case might involve the interests of a corporate retirement plan’s sponsor versus the interests of the employees. Fiduciaries straddles a thin line. Leaning one way or another can prove problematic. “A fiduciary should not favor any class of beneficiary,” says Lee, “as all beneficiaries should receive the same level of care and service as directed by the governing document.”

#5: Never Place the Client in a Precarious Position

Quite simply, this is negligence. Sometimes it does not appear that way, as we often mistake “cutting corners” with “efficiency.” All trust documents contain explicit instructions. If they pertain to you, do not ignore them. This is particularly true of ERISA plans. Hughes says, “You must never engage in acts that may result in the loss of ERISA Section 404(c) protections (such as changing participants investments or not providing a ‘mapping’ notice). This is because doing these things will likely result in losses to the sponsor and the plan and/or personal liability to you as the professional fiduciary.”

#6: Never Sell a Product

This is a classic “never” (how many of you were waiting for it?). You may buy a product on behalf of a beneficiary, but you must never sell a product. What is the difference? “You must never sell ‘product’,” says Randy Kurtz, Chief Investment Officer at Betavisor, LLC in Chicago, Illinois. “You must be compensated only by your end clients. Having more than one person paying you will inevitably create a conflict of interest.” Meredith Briggs of Taconic Advisors, Inc. in Poughkeepsie, New York, says, “To be a professional fiduciary, you clearly can never put your own best interest ahead of the clients’. You can never take

part in a system that incentivizes commission-based advice. You can never steer them in a direction that benefits someone else over them. You would never take car buying advice from the slick guy in the suit at the dealership...do not make the same mistake with your financial plan and investments!" It all comes down to this: "Never benefit improperly from your role," says French. "A fiduciary is entitled to compensation. A fiduciary should not otherwise improperly benefit from his position."

#7: Never Keep Clients Longer Than They Need You

This may be the toughest "never" to live up to, especially after you have developed that familial bond we referred to in the second item on our list. It may be that, over time, circumstances change, and the fiduciary has too much of a vested interest to offer objective advice. "You must never remain in a conflict position once discovered," says French. "There may be a time a fiduciary has to step aside and relinquish his role. Once a conflict has arisen, it is time to get out." It is not just that there "may" be a time, but for younger professionals acting as fiduciaries for older clients, there will be a time. "Never advise someone to postpone retirement when they can afford to retire and they desire to retire," says Kurtz. "Too many advisors feel the "asset draw" during retirement is bad for the advisor!"

FiduciaryNews.com, August 14, 2018.

4. GOT A BIG TAX REFUND? USE IRS WITHHOLDING CALCULATOR TO BOOST TAKE HOME PAY IN 2018:

Taxpayers who received large refunds earlier this year may be able to get more of their money included in their paychecks during the rest of 2018 by using the [Withholding Calculator](#) on IRS.gov. According to the Internal Revenue Service, most taxpayers – more than seven out of 10 – receive refunds averaging around \$2,800. Typically, taxpayers who receive large refunds could receive more of their money throughout the year, rather than waiting until they file their tax return after the end of the year. The Tax Cuts and Jobs Act, enacted in December, made major changes to the tax law. Any of these far-reaching changes could have an impact on the refund many taxpayers will receive when they file their 2018 tax return. The IRS encourages every employee, including those who typically receive big tax refunds, to do a "paycheck checkup" soon to ensure they have the appropriate amount of tax taken out of their pay.

TCJA changes that could have a big impact on tax refunds this year include:

- Reduced tax rates and changed tax brackets.
- Eliminated personal exemptions.
- Increased standard deduction.
- Expanded and increased Child Tax Credit.
- A new credit for other dependents.
- Some limited or discontinued deductions.

The IRS urges taxpayers to complete their “paycheck checkup” now so that if a withholding amount adjustment is necessary, there is more time for withholding to take place evenly throughout the year. Waiting means there are fewer pay periods to withhold the necessary federal tax – so more tax will have to be withheld from each remaining paycheck. Adjusting withholding can prevent taxpayers from having too little tax or too much withheld. Too little withheld could result in an unexpected tax bill or penalty at tax time in 2019. It is helpful if taxpayers have their completed 2017 tax return available when using the Withholding Calculator to estimate the amount of income, deductions, adjustments and credits to enter. Filers also need their most recent pay stubs to compute the employee’s withholding so far this year. Calculator results depend on the accuracy of information entered. If a taxpayer’s personal circumstances change during the year, they should return to the calculator to check whether their withholding should be changed. Employees can use the results from the Withholding Calculator to help determine if they should complete a new [Form W-4](#) and, if so, what information to enter on a new Form W-4. Taxpayers who change their withholding for 2018 should recheck their withholding at the start of 2019, especially those who reduced their withholding sometime in 2018. A mid-year withholding change in 2018 may have a different full-year impact in 2019. Taxpayers who do not file a new Form W-4 for 2019, may have a higher or lower withholding than intend. To help protect against having too little withheld in 2019, IRS encourages all filers to check their withholding again early in 2019. The Withholding Calculator does not request personally-identifiable information, such as name, Social Security number, address or bank account number. The IRS does not save or record the information entered on the calculator. As always, taxpayers should watch out for tax scams, especially via email or phone and be alert to cybercriminals impersonating the

IRS. The IRS does not send emails related to the Withholding Calculator or the information entered in it. Employees who need to complete a new Form W-4 should submit it to their employers as soon as possible. Employees with a change in personal circumstances that reduce the number of withholding allowances must submit a new Form W-4 with corrected withholding allowances to their employer within 10 days of the change. Taxpayers may also need to determine if they should make adjustments to their state or local withholding. They can contact their [state's department of revenue](#) to learn more. [IRS.gov/getready](#) has information about steps taxpayers can take now to get a jump on next year's taxes, including how the new tax law may affect them. IRS Newswire, Issue Number: IR-2018-163, August 13, 2018.

5. WHITE COLLAR PROSECUTIONS DOWN MORE THAN 35 PERCENT:

Monthly comparisons of the number of defendants charged with white collar crime-related offenses are down 6.3 percent from the same period one year ago, and more than 35 percent from 2013. The downward trend has accelerated under the Trump DOJ, but dates back well into the Obama years. The largest number of prosecutions for May 2018 was for fraud, broadly defined, with sub-categories like Fraud-Health Care, Fraud-Financial Institution and Fraud-Other Business accounting for many of the 459 new cases opened. The Southern District of New York and the Southern District of Florida (Miami) were the busiest white collar courts. The District of Idaho now ranks third. The federal judicial district that showed the greatest growth in the rate of white collar crime prosecutions compared to one year ago - - 124 percent - - was Northern District of Georgia (Atlanta). The lead investigative agency for white collar crime prosecutions in May 2018 was the FBI, accounting for 25 percent of prosecutions referred. Other agencies with substantial numbers were Postal, IRS and Health and Human Services. *Today's General Counsel*, August 13, 2018.

6. PENSIONS BEAT EXPECTATIONS FOR 2ND STRAIGHT YEAR:

Pension plans are reporting another better-than-expected year for investment returns, writes Liz Farmer. But experts caution that most pensions still face long-term challenges when it comes to improving their overall fiscal health. Looking at roughly half-a-dozen major plans that have released their preliminary annual return, *Governing* found that most pensions bested their annual projections, reporting a nearly 9 percent return on their investments in fiscal 2018. For most plans, that is more than one percentage point above

projections. North Carolina Retirement Systems reported the lowest return rate of only 7.3 percent. At the other end of the spectrum, New York state reported a nearly 13 percent annual return. This better-than-expected year comes after an even better one: In fiscal 2017, many plans reported double-digit returns. A booming stock market is a big reason for the positive growth these last two years as pension plans typically have anywhere from about [40 to 50 percent of assets](#) invested in equities. Pension plans rely heavily on investment earnings because annual payments from current employees and governments aren't enough to cover yearly payouts to retirees. As it stands, [roughly 80 cents on every dollar paid out](#) to retirees comes from investment income. Two years of investment returns exceeding expectations undoubtedly helps, says Fitch Ratings Senior Director Douglas Offerman. "It is great to have a string of positive years," he says. "It does make an incremental difference." After two years of stellar returns, for example, California's Public Employees Retirement System expects to bump up its funded status by three points to 71 percent. But, Offerman adds, this year's positive news has to be viewed "against a larger backdrop of unrelenting pressure on pensions." Nationally, public pension plans have collectively exceeded their assumed rates of return at least five times since the financial crisis in 2008, according to data collected by the Boston College Center for Retirement Research. (This year would mark the sixth.) Yet funding ratios have steadily declined for five straight years. Since 2012, the average plan has hovered around having 72 percent of the money it needs to eventually pay retirement benefits to current and future retirees. Meanwhile, governments' contributions to pension plans have ballooned, growing by 74 percent between 2010 and 2017, according to an analysis by Fitch. In other words, it is a lot harder to make up ground than it is to lose it. This is primarily due to the fact that there are more retirees than ever, which means that in some years plans will have more money going out in payouts than coming in via worker and government contributions and investment earnings. Governments have collectively gotten better at making their full pension contributions in recent years thanks to a stabilizing economy. But because of the way pension accounting is done, every year a government skimps on a payment or investment returns fall short of expectations, a pension's funded ratio gets worse. Pension plans have previously [resisted lowering their investment return assumptions](#) because it means higher bills from contributing governments to make up the difference. But in recent years, that resistance has fallen away as dozens of plans have begun shifting their assumptions downward. For the first time, dozens of plans are assuming a lower than 7 percent annual rate of return on investments, while the national median has gone from 8

percent in 2001 to 7.5 percent this year. In doing so, many believe pension plans are setting themselves up for more stability down the road - - assuming governments can keep up their pension payments. "The fact that [plans] are getting more realistic about return assumptions is a positive," says Offerman. "It at least forces a recognition of what the real cost of benefits are."

7. WORKERS HARDEST HIT BY RECESSION ARE JOINING IN RECOVERY:

The least educated American workers, who took the hardest hit in the Great Recession, were also among the slowest to harvest the gains of the recovery. Now they are a striking symbol of a strong economy. The unemployment rate for those without a high school diploma fell to 5.1 percent in July, the Labor Department reported the lowest since the government began collecting data on such workers in 1992. At the economy's nadir in the summer of 2009, the unemployment rate for high school dropouts hit 15.6 percent, more than three times the peak unemployment rate for college graduates. Buffeted by technological change and seemingly out of place in an economy where skills and credentials are in ever more demand, this cohort struggled while more educated workers scored jobs and promotions and rose on the economic ladder. High school dropouts make up 7.2 percent of the labor force, and some experts doubted they and other low-skilled workers would ever fully recover from the effects of the recession, said Betsey Stevenson, a professor of economics at the University of Michigan. "As economists, we worried these workers would be shut out forever," she said. "But the long duration of the recovery has pulled them back in. As the economy adds more jobs, employers have had to dig a little deeper." Unemployment among the least educated, the group hit hardest in the recession, has been cut by two-thirds since its peak of almost 16 percent in 2010. The improvement in the fortunes of less-educated workers was a highlight in a jobs report that showed continuing gains across a broad variety of sectors. Over all in July, employers increased payrolls by 157,000, while the unemployment rate edged downward to 3.9 percent, near the 18-year low achieved in May. The data echoed other positive economic news recently, including a report last week showing the economy grew by 4.1 percent in the second quarter. And the headlines about President Trump's tariffs on steel and aluminum and a widening trade war with China seem to have done little to put a damper on hiring. The manufacturing sector, which is particularly sensitive to exports, was robust, adding 37,000 jobs. Although the payroll increase in July was slightly below what Wall Street was expecting, upward revisions for May and June alleviated fears of a slowdown. Several

economists linked the shortfall to the shutdown of Toys “R” Us, and the loss of 32,000 jobs at sporting goods, book and hobby stores. The Federal Reserve upgraded its view of the economy’s underlying condition from “solid” to “strong.” The central bank remains on course to raise interest rates twice more this year to avert overheating. Other indicators suggest the recovery is finally extending its reach. The Labor Department’s broadest measure of unemployment, which includes workers forced to take part-time jobs because full-time positions are unavailable, fell to 7.5 percent in July, the lowest since 2001. All this has translated into better economic opportunities for workers without a college degree, who account for a majority of the work force. It is a contingent that was championed by Mr. Trump during his presidential campaign, and one that both parties want to appeal to in the midterm elections in November. The White House was quick to note that the economy is in the midst of the longest monthly streak of job growth in history. And after 94 consecutive months of job creation, bosses and human resource departments are recalibrating their requirements. “You definitely get the sense that employers are willing to look at workers they haven’t looked at in the past,” said Martha Gimbel, director of economic research at Indeed.com, the employment website. Unemployed Americans who might not have put feelers out in the past are also venturing back into the hunt for a job, she said. On Indeed’s search engine, much of the growth in queries lately has been for positions like full-time cashier, mobile home park manager, maintenance person and fulfillment associate. “This is an indicator that low-skilled workers are seeing opportunities for themselves in the labor market,” Ms. Gimbel said. Until recently at Steel Ceilings in Johnstown, Ohio, the company’s president, Rick Sandor, insisted on a couple of years’ experience in metal fabrication before considering applicants. But he’s had a harder time lately finding workers for his company, where shifts run from 5 a.m. to 2 p.m. and temporary positions start at \$14 per hour. He now settles for candidates who show mechanical skills, like carpentry or heating and cooling repair. Mr. Sandor is willing to waive the requirement for a high school diploma as well and has even hired applicants with what he terms “minor” prison sentences. “If a person was truly trying to get their life back together, we thought it would be helpful to offer them a job,” he said. Unemployment for less-skilled workers has been dropping for several years, with a pickup in hiring in sectors like manufacturing, construction and parts of health care. And to be sure, the month-to-month figures for unemployment among high school dropouts are volatile. But the long-term trend is clear, as is hiring among the sectors responsible for it. Last month, the leisure and hospitality field recorded a 40,000 gain in positions, with half of that

coming from restaurants. For example, Buffalo Wings & Rings, a restaurant chain with 60 locations in 13 states, has been stepping up hiring and opening new restaurants. Many outlets have seen double-digit sales growth over the past year, and some are up as much as 40 percent, said Nader Masadeh, the company's chief executive. The tax cuts that took effect in January are playing a role, Mr. Masadeh said - - most families may have gotten a relatively small tax cut, but it is enough to fuel a few more nights out. "People feel good. They're going out and spending more money," he said. "In our segment, \$50 feeds you and your family." Still, the hot economy brings challenges of its own. At an annual gathering of the company's franchisees in June, Mr. Masadeh said, he was bombarded with questions about how to retain talent when workers can readily walk out the door and find another job. And costs are rising throughout his business. "Right now the economy is great, but we're also seeing higher construction costs, higher commodity items, shortages of labor, so there's always something that counterbalances something else," he said. That pressure, however, has not resulted in much fatter paychecks for most workers. The Labor Department said average hourly earnings ticked modestly higher in July, putting the annual rise at 2.7 percent. That's below the pace of inflation in recent months. One reason for the lack of big raises is that a substantial number of workers remain on the sidelines, including the less-skilled ones who are now gradually coming back, said Simona Mocuta, senior economist with State Street Global Advisors. "We are bringing unemployment way below 4.5 percent, which the Fed considers full employment," Ms. Mocuta said. "But we are getting very modest wage inflation. This is an issue not just for the U.S., but in every other developed market." "Because the labor market is tight, less-educated workers have more of a chance of getting hired," she added. "For people with the highest level of education, it's easier to find jobs even when the economy isn't doing well." This piece comes from by Nelson D. Schwartz and Ben Casselman at The New York *Times*.

8. STATE SUPREME COURT SIDES WITH UNION OVER SAN DIEGO PENSIONS:

Associated Press reports that in a win for public employee unions, the California Supreme Court on Thursday said San Diego's mayor should have met with representatives for city workers before the city placed a measure on the 2012 ballot that cut workers' retirement benefits. The court ruled unanimously that then-San Diego Mayor Jerry Sanders was so involved with the ballot measure that he was obligated to confer with union officials about it. The measure approved by voters - - Proposition B - - imposed a six-year freeze on pay levels used to determine pension benefits unless a two-thirds majority of the City Council

voted to override it. It also put new hires, except for police officers, into 401(k)-style plans. The court did not invalidate the San Diego ballot measure and undo the cuts approved by voters. Instead, it sent the case back to a lower court to arrive at a solution. "We will vigorously fight any attempt to modify or overturn any part of Prop B," said former San Diego City Councilman Carl DeMaio, who authored the measure. He said any decision by the lower court to change or reverse the proposition would be appealed. State law requires government officials to confer in good faith with public employee unions about wages and other terms of employment. San Diego argued that the pension measure was sponsored by local residents, so it was exempt from the state requirement. But the Supreme Court said Sanders used the powers and resources of his office to play a major role in promoting the measure. "Here, Mayor Sanders conceived the idea of a citizens' initiative pension reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward," Associate Justice Carol Corrigan wrote for the court. "He relied on his position of authority and employed his staff throughout the process." The decision hampers efforts to pursue changes to government pensions by ballot initiative, which can be the only way to achieve reform because unions control the political levers of city government, said Chuck Reed, the former mayor of San Jose who has warned about the dangers of unfunded pension debt. He backed a pension measure that passed in San Jose in 2012 that cut benefits for new hires. Reed said he met with union leaders dozens of times about his pension proposal, so the ruling would not have posed a threat to that measure. But he said the ruling will "make it more difficult for individual councilmembers or individual mayors to help the citizens' initiatives." The justices overturned a lower court ruling that could have further diminished the requirement that cities and counties meet with unions before cutting the benefits of government workers, said Michael Zucchet, general manager of the San Diego Municipal Employees Association, which challenged the ballot measure. "You do have to talk to employees before you do them dirty," he said. The Supreme Court signaled it was ruling narrowly, noting that the "line between official action and private activities undertaken by public officials may be less clear in other circumstances."

9. SELF-DIRECTED BROKERAGE WINDOWS IN 401(K) PLANS. DO FIDUCIARIES HAVE TO LOOK INSIDE?:

Writing in a recent Morgan Lewis blog, Michael B. Richman and Julie K. Stapel sat that many participant-directed 401(k) plans these days include a self-directed brokerage

window option as a way to supplement the plan's menu of designated investment options. While the plan's menu may be limited to 10-25 investment alternatives, depending on the particular plan (for this purpose, counting a target-date fund suite as a single alternative), a brokerage window can provide access to several thousand mutual funds as well as - - depending on the particular arrangement - - the ability to trade in individual stocks, bonds, options or other securities. One might think that there is a lower level of liability risk for plan fiduciaries where a brokerage window is available, particularly where the window supplements a menu of selected investment options, because it gives plan participants greater choice without any expectation that the fiduciaries are responsible for each and every investment available through the window. In fact, the presence of a brokerage window has been helpful in reaching a good outcome for plan sponsors and fiduciaries in some of the "excessive fee" cases over the last 12 years. However, there can still be fiduciary obligations related to offering the brokerage window that, if not met, could trigger liability. First, regardless of whether the decision to include a brokerage window feature is itself a fiduciary decision (while there is nothing directly on point, our view is that it should not be), regulatory guidance indicates that the choice of the broker, and negotiation of the broker's fees and other charges, may very well be a fiduciary act. Thus, the selection of the broker, and negotiation of the brokerage window arrangement, should be undertaken in a prudent manner and documented accordingly. Second, it is less clear whether the fiduciary rules apply to the decision as to the scope of the investments available through the brokerage window. One question that comes up from time to time is whether the plan sponsor and plan fiduciaries should consider the sophistication of the plan participants in deciding whether to provide a brokerage window and what investments to include, and whether to exclude higher-risk investments. There is no guidance on this specific issue, but these types of concerns are the reason why many plans limit their brokerage windows to mutual funds. Also, the ERISA Section 404(c) exception to fiduciary responsibility for participant-directed plans excludes from its relief certain types of investments, in particular those where there is a risk of a loss that exceeds the participant's account balance. This limitation may be a reason to exclude, for example, certain types of partnership interests and options. Plan sponsors often seek to address sophistication issues in part by obtaining representations from plan participants who decide to use the brokerage window, in which a participant acknowledges his or her responsibility for the risks of his or her brokerage window investments. Third, and related to the second point, the US Department of Labor (DOL) has raised the question of whether there should be some responsibility for

plan fiduciaries to at least monitor the usage of investments through the brokerage window. In 2012, following the finalization of the participant-directed plan disclosure rules, DOL issued guidance indicating that the investment disclosure portion of those rules could apply to brokerage window investments that attract over a certain percentage of plan participants' investments. Because of concerns raised about the administrative burdens of monitoring and tracking brokerage window investments, this guidance was withdrawn, but with a note that DOL would be considering further guidance in this area. While DOL issued a request for information about brokerage window practices in 2014 in anticipation of further rulemaking, it has not taken any further action. Fourth, while the participant-directed plan disclosure rules may not require any disclosures about specific investments available through brokerage windows, they do require that disclosures regarding the brokerage window arrangement, and the related fees and charges, be provided to all plan participants eligible to use the window, not just those actually using it. This creates a fiduciary disclosure obligation for plan administrators. In sum, there are a number of obligations that may require plan fiduciaries to look inside the window when offering a brokerage window option. While there are some uncertain areas, those could be further clarified and defined by future DOL guidance, so fiduciaries of plans that currently offer - - or are considering offering - - brokerage windows will want to monitor ongoing developments.

10. VETERANS CAN NOW FILE CLASS-ACTION LAWSUITS AGAINST VA:

A [federal court ruling](#) opened the possibility for veterans to file suit against the Department of Veterans Affairs as a class rather than individuals, a move that advocates say could dramatically shift how legal cases against the bureaucracy are handled. The ruling, [Monk v. Wilkie](#), came from the [U.S. Court of Veterans Appeals](#). The eight-justice panel ultimately ruled against the plaintiffs' claim that their case should proceed as a class-action suit, arguing it failed to meet previously established standards for such legal consideration. But they did say that in "appropriate cases" in the future, class-action lawsuits would be entertained. "This is a watershed decision, and its importance should not be diminished merely because the court declined to certify this proposed class," Chief Judge Robert Davis wrote in the opinion. "On the contrary, the court's decision will shape our jurisprudence for years to come and, I hope, bring about positive change for our nation's veterans." Fellow appeals court Judge Michael Allen said the decision "has been decades in coming and holds great promise as a means to address systemic problems in

the VA system.” In private lawsuits, individuals must prove specific harm or damage to their personal situation in order to win judgment. But in class-action lawsuits, plaintiffs can show illegal or harmful activity against a larger group, bringing with it different standards for correction. Officials with the Veterans Legal Services Clinic at Yale Law School, which brought the suit on behalf of Vietnam veteran Conley Monk Jr., praised the decision as a historic step forward. “(Allowing class-action suits) will allow our nation’s veterans to unite in fighting for prompt answers to their disability benefits claims,” said clinic law student Catherine McCarthy said in a statement. “The VA’s delays are intolerable, and we hope the court will exercise its class action authority to hold the agency to account.” Whether future cases will have an easier time establishing an eligible class remains to be seen. In this case, the panel of judges rejected Monk’s claim that all veterans facing lengthy wait times for benefits appeals cases should be able to collectively sue the department to force a quicker response. But the new legal avenue could open the possibility of groups of veterans with the same illness banding together to force VA to respond, or require policy changes based on problems a similar group has reported in navigating VA systems. Specific damages awards are not covered in the new ruling. Leo Shane III, *Military Times*, August 24, 2018.

11. 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.

12. PUN TIME:

Have you ever tried to eat a clock? It is very time consuming.

13. INSPIRATIONAL QUOTES:

If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away. - Henry David Thoreau

14. TODAY IN HISTORY:

On this day in:

- 1522, Ferdinand Magellan's Spanish expedition aboard the Vitoria returns to Spain without their captain. First to circumnavigate the earth.
- 1620, the Mayflower departs Plymouth, England with 102 Pilgrims and about 30 crew for the New World.
- 1901, US President William McKinley is shot by Leon Czolgosz, an anarchist, while visiting the Pan-American Exposition in New York.

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

Copyright, 1996-2018, all rights reserved.

Items in this Newsletter may be excerpts or summaries of original or secondary source material, and may have been reorganized for clarity and brevity. This Newsletter is general in nature and is not intended to provide specific legal or other advice.

* * * * *

975 Arthur Godfrey Road, Suite 500
Miami Beach, Florida 33140
Telephone: 305.532.3200
Telephone/Toll Free 800.332.3200
Telecopier: 305.535.0050
www.cypen.com
info@cypen.com

* * * * *

