



# CYPEN & CYPEN NEWSLETTER for October 3, 2019

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

## **1. CLASS ACTION CHALLENGING HOSPITAL AUTHORITY'S GOVERNMENTAL PLAN EXEMPTION DISMISSED:**

This case considered whether benefit plans sponsored by a nonprofit health care conglomerate (Hospital Authority) were governmental plans exempt from ERISA. The Hospital Authority was created pursuant to a state statute authorizing cities and counties to create hospital authorities and registered as a municipal body. It was governed by a board of commissioners sworn to support the state and federal constitutions. The original commissioners were appointed by a city mayor (a public official), with new members appointed by the chairman of county commissioners (also a public official), who had the statutory power to remove a commissioner for inefficiency, neglect of duty, or misconduct. The Hospital Authority was granted "all powers necessary or convenient to carry out the

purposes” of the authorizing statute. It treated its plans, which included pension, 401(k), and health plans, as governmental plans exempt from ERISA, but former employees and plan participants disagreed with the characterization and filed a class action alleging that the plans were not governmental plans and, thus, were subject to ERISA. At issue was whether the Hospital Authority met the “political subdivision” element of the ERISA exemption for governmental plans established or maintained by the federal government, by the government of any state or political subdivision thereof, or by any agency or instrumentality thereof. Finding that the Hospital Authority’s plans were governmental plans, the court dismissed the case. It explained that political subdivisions are entities that are either “(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” Because the Hospital Authority was created “by a local entity pursuant to a state enabling statute,” the court ruled that the first prong of the test was satisfied. It clarified that the state itself was not required to create the Hospital Authority--a city or county exercising its state-delegated authority was enough. Although unnecessary, the court further ruled that the second prong was satisfied because a public official--the chairman--by statute had appointment and removal powers with respect to the commissioners. The court declined to consider the employees’ argument that, in actual operation, the chairman’s oversight and removal powers were not exercised.

### **EBIA Comment**

ERISA does not define “political subdivision” for these purposes, so courts are left to interpret it. Because application of the governmental plan exemption will depend, to a large degree, on how the employing entity is treated under state law, similar entities in different states may be treated differently for purposes of the exemption. *Shore v. Charlotte-Mecklenburg Hosp. Auth.*, 2019 WL 4141059 (M.D.N.C. 2019) available [here](#). EBIA Staff, EBIA, September 26, 2019.

## **2. OUR NEW NURSING HOME ARBITRATION MANDATE -- EDUCATE, EDUCATE, EDUCATE:**

The recent rule by the Centers for Medicare and Medicaid Advocacy (CMS) permitting nursing homes to enter into pre-dispute, binding agreements with residents or their representatives was deeply disappointing to resident advocacy groups, including the ABA and its Commission on Law and Aging, which advocated strongly for a full ban on nursing home arbitration agreements. Like many groups, we do not believe that the time of admission to a nursing home is appropriate for informed decision-making about such agreements. Nursing home admission is usually a time of crisis for individuals and their families; the resident is in an impaired condition, the choice of nursing homes may be

severely limited, and the resident and family have no idea of the kind of dispute that might be bound by an arbitration clause in the future. There are advantages and disadvantages to arbitration, but it is only after a dispute arises that those pros and cons can be fully weighed, and an informed and voluntary decision can be made. Charles P. Sabatino, [Bifocal, Vol. 40, Issue 6 \(July-August 2019\)](#), American Bar Association, September 24, 2019.

### **3. THE STATE OF RECOVERY TWO YEARS AFTER HURRICANES IRMA AND MARIA:**

It's been 2 years since hurricanes Irma and Maria [caused extensive damage](#) to several areas, including Puerto Rico, Florida, and the U.S. Virgin Islands. Hurricane Maria was the strongest hurricane to make landfall in Puerto Rico since 1928, destroying highways and buildings, and [causing total failure of energy](#) and communication systems, among other things. In this WatchBlog, we share findings from some of our recent reports on federal disaster relief efforts.

#### **Coordinating mass care**

When disaster strikes, FEMA and the Red Cross are primarily responsible for coordinating mass care for survivors, such as providing food and shelter. [We looked](#) at how these agencies coordinated with each other in response to the 2017 hurricanes and found that they benefited from co-locating with key partners during disaster response. In addition to setting up a joint operation center in Washington, D.C., they worked side-by-side in state and local emergency operations centers with partners such as the Salvation Army and other voluntary organizations active in disaster relief. Co-locating key partners was especially beneficial to helping maintain communication in Puerto Rico and the Virgin Islands in the face of lengthy power outages and major damage to public structures. However, some needs like shelter, food, and supply distribution, were unmet. Providing mass care services was challenging in part because the written agreements between state and local governments with voluntary organizations didn't always detail which services each could provide. To address these issues, [we recommended](#) that FEMA emphasize the importance of clearly defining roles and responsibilities when developing written agreements.

#### **Disaster assistance for those who are older or have disabilities**

We also reported on the [challenges that people who are older or have disabilities faced](#) after the 2017 hurricanes. For example, we found that these individuals faced challenges accessing food, water, medicine, and oxygen. In addition, these individuals faced challenges applying for assistance from FEMA. For example, survivors and local government officials told us that they faced long wait times and could not access the

online applications due to power outages. [We recommended](#) that FEMA implement new registration-intake questions to better identify and address survivors' disability-related needs, among other things.

#### **Continuing the recovery effort**

With FEMA's assistance, [Puerto Rico and the Virgin Islands are continuing their recovery](#) efforts. As of April 2019, FEMA has obligated \$7.4 billion for emergency work—such as debris removal and generators—and permanent work repairing or replacing roads and public infrastructure. GAO Watchblog, September 23, 2019.

#### **4. SOCIAL SECURITY AND OIG ESTABLISH NEW ANTI-FRAUD UNITS:**

The Social Security Administration and its Office of the Inspector General (OIG) announced the expansion of its successful anti-fraud initiative, the Cooperative Disability Investigations (CDI) Program. CDI Units identify, investigate, and prevent Social Security disability fraud. Three new statewide offices recently opened across the country, in Bismarck, North Dakota; Boise, Idaho; and Helena, Montana. In addition, the Puerto Rico office has expanded their investigative scope to include cases in the U.S. Virgin Islands. The CDI Program helps to resolve questions of potential fraud before benefits are ever paid. The innovative initiative continues to be successful by bringing together personnel from Social Security, its OIG, State Disability Determination Services (DDS), and local law enforcement agencies to investigate and analyze suspicious or questionable Social Security disability claims. CDI Unit efforts assist disability examiners in making informed decisions, ensure payment accuracy, and generate significant taxpayer savings, for both Federal and State programs. "Social Security has zero tolerance for fraud and we are committed to detecting and preventing it. Our CDI Program serves a vital role in that commitment," said Andrew Saul, Commissioner of Social Security. "We diligently work at the national and local levels to stop fraud and carry out our mission of delivering quality Social Security services to the public." The CDI Program consists of 46 units covering 40 states, the District of Columbia, and the U.S. territories. Social Security and OIG have opened several units in the last few years as they work together to provide CDI coverage for all 50 states by 2022. "We are pleased to announce this expansion of the CDI Program as we move closer to our goal of covering all 50 States. CDI has a significant impact on the integrity of Social Security's disability programs, and is an important resource for those making disability determinations," said Inspector General Gail S. Ennis. "This initiative is successful at preventing fraud in part due to the vital role of interagency partnerships, so we welcome Idaho, Montana, and North Dakota as they join this effort." Since 1997, when Social Security and OIG established CDI, its efforts have contributed to \$4 billion in projected savings to Social Security's programs, and \$3 billion in projected savings to other Federal and State programs. For more information, please [visit the OIG website](#) and

Social Security's anti-fraud website at [www.socialsecurity.gov/antifraudfacts/](http://www.socialsecurity.gov/antifraudfacts/). Mark Hinkle, Acting Press Officer, Social Security Administration, September 23, 2019.

#### **5. FDIC'S OFFICE OF THE OMBUDSMAN PUBLISHES ITS 2018 ANNUAL REPORT:**

The Federal Deposit Insurance Corporation's (FDIC) Office of the Ombudsman, an independent, neutral and confidential liaison between the agency and its stakeholders, published its 2018 Annual Report outlining the office's structure, outreach activities, and goals. "Engaging with our stakeholders helps the FDIC maintain strong working relationships and assists in identifying potentially recurring questions or issues that may warrant policy or process changes at the FDIC," said FDIC Ombudsman, M. Anthony Lowe. "It is our hope that this annual report will continue to promote transparency relative to the agency's activities." In 2018, the Ombudsman Office handled 142 industry cases, many of which were able to be resolved by providing information and assistance (65%) for bank-specific questions or issues. The office also conducted outreach visits to nearly 500 external stakeholders, including banks, trade associations and state banking authorities. Through this engagement the Ombudsman was able to work with bankers on many important efforts such as: [collecting ideas around reducing] regulatory burden, offering clarity around requirements of the FASB rulemaking on Current Expected Credit Losses (CECL), Truth in Lending Act (16%), and helping banks meet their obligations under the Bank Secrecy Act (15%). The FDIC established the Ombudsman Office in 1994 to serve as an independent, neutral and confidential liaison between the FDIC and its stakeholders. To learn more about the office, or to submit an inquiry or comment, please visit [www.fdic.gov/ombudsman](http://www.fdic.gov/ombudsman). See the report [here](#). Congress created the Federal Deposit Insurance Corporation in 1933 to restore public confidence in the nation's banking system. The FDIC insures deposits at the nation's banks and savings associations, 5,303 as of June 30, 2019. It promotes the safety and soundness of these institutions by identifying, monitoring and addressing risks to which they are exposed. The FDIC receives no federal tax dollars--insured financial institutions fund its operations. David Barr, [PR-81-2019](#), FDIC, September 23, 2019.

#### **6. NEED CASH? HARDSHIP WITHDRAWALS FROM YOUR RETIREMENT PLAN JUST GOT EASIER:**

It just got easier to take money out of your 401(k) or 403(b) retirement plan. The Internal Revenue Service has issued [final rules on hardship withdrawals](#) that spell out a host of changes meant to cut down on red tape. Some are mandatory--employers must make the changes as of Jan. 1, 2020, and other are optional. So, how lenient your retirement plan rules are still depends in part on your employer. Ideally you want to leave your 401(k) alone until retirement. If you're under 59 ½, you'll owe income taxes on withdrawals and also a 10% penalty unless you meet certain exceptions like being disabled or in debt for

medical expenses that exceed 7.5% of your adjusted gross income. But what if you really need the cash? First consider options other than a hardship withdrawal. If you have a Roth IRA, you can always withdraw the money you've contributed penalty-free and tax-free. The next choice would be to consider a 401(k) loan. You can borrow up to \$50,000, or half the balance in your account, whichever is less. Then you end up paying it back to yourself (your 401(k)) with interest. That means you avoid the tax hit and preserve your retirement funds. Watch out if you leave your employer: You'll have to pay it back by October, the due date of your tax return on extension, of the year after you take out the loan.) With a hardship withdrawal, you can't repay the money to avoid a tax hit, so you've permanently taken the money out of the tax-advantaged retirement system. The threshold for taking a hardship withdrawal hasn't changed. You must be facing an "immediate and heavy" financial need, and you can only withdraw an amount to meet that need. Here's what's changed.

**Disaster-related expenses.**

The new rules add a seventh category to what automatically counts as a hardship withdrawal: disaster-related expenses of an employee who lived or worked in a federal-declared disaster area. (Note this is not as broad as prior IRS disaster-relief announcements which extended hardship withdrawals to employees taking them on behalf of relatives and dependents.) The other safe harbor withdrawal categories are: medical expenses, home purchase costs, college costs for the next 12 months, payments to prevent eviction/foreclosure, funeral expenses and home casualty loss repairs. Most employers use these categories, but they aren't required to. Some have a catch-all category, so look for that.

**The six-month rule.** This change is required. It used to be that after taking a hardship distribution, you'd be prohibited from contributing to your 401(k) for the following six months. Now, that six-month suspension rule is eliminated. For hardship distributions taken on or after Jan. 1, 2020, employers must let you get right back to making payroll contributions, so you can build back your 401(k) balance.

**The loan-first rule.** This change is optional. It used to be that you had to take a plan loan before a hardship withdrawal. Now employers can eliminate that requirement. That makes sense for employees who pretty much know they're not going to be in a position to pay back a loan.

**More sources to tap.** This one's optional too. You used to only be able to access your own contributions--money you stashed away--as hardship withdrawals. Now employers may change their plans to allow you to tap earnings, and qualified nonelective

contributions or qualified matching contributions if you have those.

**New employee representation requirement.**

Employers didn't like figuring out when a distribution is necessary. Now there's a straightforward three-part test that covers the employer. The employee must first access other employer plan money if available – ESOP dividends or deferred compensation. Then, the employee signs off that he or she has insufficient cash or other liquid assets reasonably available, and the plan administrator must sign off that he or she doesn't have any reason to believe the employee could do without the hardship withdrawal. The rules for 403(b) retirement plans are generally the same as 401(k)s. One difference is that earnings can't be distributed as part of a hardship withdrawal. Ashlea Ebeling, *Forbes*, September 20, 2019.

**7. SOCIETY OF ACTUARIES TO SHIFT TO ORIENTED CHARTER:**

The new president-elect will be Roy Goldman, who was Humana's chief actuary. Members of the Society of Actuaries are defending themselves against the rise of the data scientists by having the SOA shift to a new, more market-oriented structure. SOA members have voted 92.3% to 7.7% to move the top-level SOA entity to a charter based on Section 501(c)(6) of the Internal Revenue Code, from a 501(c)(3) charter, the SOA announced last week. Both types of charters exempt entities from federal income taxes. A 501(c)(3) charter lets a charity, an educational organization or research institute receive tax-deductible contributions from individuals, foundations and other donors. The supporters of a 501(c)(6) organization can't deduct their contributions to the organization--but the organization can organize public awareness campaigns. James Glickman, the 2018-2019 SOA president, told members in a letter explaining the charter proposal that the SOA is committed to advancing actuaries as leaders and promoting the profession. "It is an increasingly important part of our mission to ensure the public understands the value that actuaries bring to markets and the public," Glickman wrote in the letter. "Our members have repeatedly emphasized to us the importance of this goal." The SOA was formed in 1889 and now has 32,000 members. The organization plans to implement the charter change by giving its current name to a new, 501(c)(6) entity. The existing 501(c)(3) organization will become the Society of Actuaries Research Institute. The institute will operate under the oversight of the SOA and continue to use tax-deductible contributions to fund its work.

**SOA Officers**

SOA members have also chosen Roy Goldman to be the 2019-2020 president-elect. Goldman has retired from serving as the chief actuary at Humana Inc. Goldman is a Jacksonville Beach, Florida, resident who has a bachelor's degree in mathematics from

Franklin and Marshall University and a doctorate in math from Rutgers University. He holds the fellow of the SOA, member of the American Academy of Actuaries, and Chartered Enterprise Risk Analyst professional designations. Goldman was an actuary at Prudential Financial for 20 years. When he left, in 1998, he was a senior vice president and chief actuary at the company's group business unit. He also has served on a Congressional Budget Office advisory panel. Andrew Rallis will be the 2019-2020 SOA president. James Glickman will be the 2019-2020 past president. The new SOA board members are Robert Eaton, William Fornia, Sharon Giffen, Lisa Kuklinski, and Xu (Vincent) Xuan. Allison Bell, Think Advisor, September 18, 2019.

#### **8. BIGLAW FIRM OFFERS SECRETARY OFFERS SECRETARY BUYOUTS WITH THESE 'EXTREMELY GENEROUS' TERMS:**

Morgan, Lewis & Bockius is offering voluntary buyouts to its legal secretaries in the United States. Secretaries who accept the buyouts will receive two weeks' pay for each year of service, capped at 52 weeks, report the [American Lawyer](#) and [Above the Law](#), which was first to report the terms. Above the Law said the package is "extremely generous" compared with the six-month cap offered by many other law firms. Morgan Lewis said in a statement that the buyout offer is purely voluntary and the law firm has no current plans for group layoffs, "regardless of the level of participation in the voluntary offering." The firm said it decided to offer the buyouts "as we continue to focus on technology innovation and cost-effective solutions for our clients, as well as the practice needs of our lawyers." The American Lawyer took a look at the Morgan Lewis careers page and discovered the firm is hiring legal practice assistants in several offices. According to the job description, these assistants will have "an opportunity to develop client relationships, routinely engage with practice group attorneys and legal professionals, and gain significant analytical and project management skills." The firm is also hiring administrative practice assistants whose duties include maintaining case and client files, processing new business intake and providing legal research. Debra Cassens Weiss, American Bar Association, September 17, 2019.

#### **9. NEW MEDICATION SAFETY AND IMPROVEMENT INITIATIVES FOR INJURED FEDERAL WORKERS:**

The U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP) Division of Federal Employees' Compensation (DFEC) has re-affirmed its award of a contract to Coventry Health Care Workers' Compensation Inc. that will allow the program to implement changes that improve and expand medication safety and quality initiatives for injured federal workers. The Department is committed to fighting the effects of opioid misuse for federal workers. Over the next year, numerous new, modern, and convenient features will be available for injured workers, prescribers, pharmacies and Department

staff. The following highlights just a few of those features. Injured workers will have increased access to medications through a vast network of pharmacies and the ability to search for their medication authorization status through a web portal. A prior authorization portal will also be available for prescribers to assist them with getting medications approved. Department staff will gain access to better knowledge of the medications prescribed through a web-based system that details injured workers' medication regimens and provides clinical recommendations about each case. At the point of sale, real-time safety checks will notify the dispensing pharmacist of any major safety precautions such as allergy warnings, drug-to-drug interactions, max dosages, duplications of therapy and other considerations. These safety checks can automatically prevent harmful prescriptions from being dispensed. With a larger team of pharmacists and nurses available through Coventry, the Department will now have the ability to review an expanded list of injured worker medication profiles, and to perform outreach to prescribers. To date, this intensive outreach has only been available to a group of injured workers prescribed opioids at a high dosage. This will allow injured federal workers to receive the best possible medication regimens for their needs. With Coventry's expertise, the Department will achieve all of this and reduce the costs charged to federal agencies for prescription medications. The Department anticipates millions of dollars in annual savings for the federal government, accomplished through paying lower prices for each medication, from the safety and quality improvement initiatives, from industry-proven strategies, such as leveraging the use of generic medications over brand name medications, and through the detection of fraud, waste, and abuse. "Today is a very encouraging day for the effective treatment of injured federal workers," said Acting Secretary of Labor Patrick Pizzella. "We have made significant improvements in reducing opioid use, and will now have additional tools necessary to expand efforts to improve the safety and quality of medication delivery for all injured federal workers, while also being good stewards of taxpayer dollars." DFEC provides wage replacement benefits, medical benefits, vocational rehabilitation, and other benefits to federal workers who experience work-related injury or occupational disease. The workers' compensation healthcare costs for federal injured workers, including the work to be performed under Coventry's contract as well as other services, averages nearly \$1 billion annually. OWCP's mission is to protect the interests of workers who are injured or become ill on the job, their families, and their employers by making timely, appropriate, and accurate decisions on claims, providing prompt payment of benefits, and helping injured workers return to gainful work as early as is feasible. The mission of the Department of Labor is to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights. Emily Weeks, Release Number 19-1619-NAT, U.S. Department of Labor, September 10, 2019.

**10. DID YOU KNOW BENJAMIN FRANKLIN SAID THIS?:**

He that would live in peace and at ease must not speak all he knows or all he sees.

**11. PONDERISMS:**

If nothing ever sticks to Teflon, how do they make Teflon stick to the pan?

**12. INSPIRATIONAL QUOTES:**

The only way to discover the limits of the possible is to go beyond them into the impossible. - Arthur C. Clarke

**13. TODAY IN HISTORY:**

On this day in 1922, 1st facsimile photo sent over city telephone lines, Washington, D.C.;  
1990 Reunification of East and West Germany. West German flag is raised above the Brandenburg Gate on the stroke of midnight.

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

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