



# CYPEN & CYPEN NEWSLETTER for March 12, 2020

Copyright, 1996-2020, 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. SECURE ACT ADDS NEW COMPLIANCE REQUIREMENTS FOR EMPLOYERS:**

Congress recently passed significant legislation affecting employer-sponsored employee benefit plans. The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 (H.R. 1994) was passed by the Senate on December 19, 2019, as part of the Further Consolidated Appropriations Act of 2020 (H.R. 1865). The changes to ERISA and the Internal Revenue Code are expansive, and include provisions that impact employer-sponsored retirement, health and welfare plan design and administration, as well as individual retirement accounts and individual taxation. This article focuses on SECURE Act provisions that are aimed at expanding employer-sponsored group benefits and associated administrative and revenue enhancement provisions. SECURE Act provisions for small employer plans, governmental plans, IRAs, as well as tax provisions impacting

firefighters, emergency responders and children are not the focus in the [summary](#). Tiffani W. Greene, Jeffrey D. Smith, Fisher Philips, March 2, 2020.

## **2. DECODING RETIREMENT: A DETAILED LOOK AT RETIREMENT DISTRIBUTIONS REPORTED ON TAX RETURNS:**

This paper uses data that combine retirement distributions reported by taxpayers on tax returns with information reported by the payers of those distributions on information returns. With the combined data we can allocate distributions reported on Form 1040 by the detailed distribution codes reported on Form 1099-R. This allows us to, for example: distinguish nontaxable rollovers from nontaxable Roth distributions or nontaxable basis; and distinguish taxable early distributions from taxable normal distributions, taxable Roth conversions, or taxable distributions related to death or disability. This paper addresses the question of how leakage should be defined when using tax data. Our analysis indicates that penalized distributions, which represent only about half of taxable distributions received by individuals younger than 55, are a reasonable approximation for leakage. For taxpayers younger than 55, unpenalized taxable distributions include payments that are not typically considered to be leakage. These include, for example, DB plan benefits paid to retired military, public safety officers, and other government employees; and distributions made after an employee or IRA owner dies or becomes disabled. The paper also examines retirement distributions more generally, looking across all age groups. We find that receipt of retirement distributions is widespread and the amounts distributed are substantial. Among taxpayers of all ages in 2010, 28 percent received gross distributions -- either directly or through a spouse -- and 26 percent received non-rollover distributions. Incidence increases dramatically with age, with nearly 60 percent of taxpayers age 59 to 69 and nearly 85 percent of taxpayers age 70 or older receiving non-rollover distributions. Among taxpayers 59 or older with distributions, non-rollover distributions average \$20,000 per person. Overall, taxpayers age 59 or older received 80 percent of the dollars distributed through non-rollovers. This research was conducted as part of the Statistics of Income Joint Research Program. Views presented are those of the authors, and do not necessarily represent the views of the Internal Revenue Service or the views of the Investment Company Institute or its members. See full paper [here](#). Peter J. Brady, Steven Bass, Social Science Research Network (SSRN), March 1, 2020.

## **3. FEES SIGNIFICANTLY VARY PERFORMANCE FOR PUBLIC DB PRIVATE EQUITY INVESTORS:**

An analysis from the Center for Retirement Research (CRR) at Boston College revealed that [public defined benefit \(DB\) plans had significantly larger assets](#) in non-traditional asset classes--such as private equity, hedge funds, and real estate--than their corporate

DB plan counterparts. Recently, corporate DB plans have been encouraged to increase assets in private equity as a way to boost returns and [update their liability-driven investing \(LDI\) strategies](#). However, a [report from Stanford University and Harvard Business School researchers](#) provides food for thought about fee negotiations with private equity investment providers. According to the researchers' estimates, public DB plans would have earned nearly \$45 billion more on their investments--equivalent to \$8.50 more per \$100 invested--had each received the best fee (based on actual results rather than forecasts) contract in its respective funds. The researchers found consistent winners and losers in the sense that some pensions systematically pay more fees than others even when investing in the same fund--what they call "pension effects." They estimate some pensions in their sample could have earned as much as \$15 more per \$100 on their investments. "We argue that this empirical finding is due to ex-ante differences in willingness to pay for the same fund," the researchers state. The researchers found evidence that larger pensions (as measured by overall assets under management) with stronger ties to the general partners (GP) of a fund tend to outperform other investors in the fund. In addition, pensions that have more member representation on their boards also appear to pay lower fees, "perhaps because more member representation lowers agency frictions at public pensions." However, the researchers note that these pension characteristics account for only a modest amount of the total pension effects that they find. "Strikingly, the distribution of pension effects is virtually identical whether we control for observable characteristics or not. In addition, controlling for pension characteristics does little to change which pension funds stand to gain the most and how much they would gain if they paid similar fees as the best performing investors in our sample," the researchers note. They say this suggests that two seemingly similar pensions choose different fee structures when investing in the same fund. Pensions may agree to pay different fees because they differ in their information about manager skill, meaning they have expectations about the gross return of the fund that come from outside sources, the researchers say. "A profit-maximizing GP would then optimally elicit these expectational differences and charge different fees accordingly," they contend. A GP could offer investors a menu of fee structures from which to choose, or GPs might offer fee breaks to more informed investors in order to attract less informed investors into the fund. The researchers also say that what they call "optimization frictions" might arise from biased beliefs about gross fund returns, a failure to fully internalize the cost structure of private market investments, poor negotiation skill or agency frictions. The suggestive evidence the researchers have for "optimization frictions" include that less than 5% of pension investors in their sample have any mention of performance fees or carry on their annual report, "despite the fact that we find differences in carry to be an important component of price dispersion." In addition, there is some evidence that frictions in labor markets and political considerations distort public pension investment decisions. The researchers

conclude: “Size, relationships, and governance account for some of the pension effects, but the majority appear orthogonal to these observable characteristics. We argue that these facts are puzzling from the perspective of several rational models of fee determination and consistent with the idea that public pensions fail to optimize when choosing fees.” Rebecca Moore, *Plansponsor*, February 28, 2020.

#### **4. REPORT: FLORIDA BUDGET VASTLY UNPREPARED FOR NEXT RECESSION:**

The sunshine state faces a not so sunny outlook if, or more to the point, when, the next recession descends upon the state. That’s because Florida lacks adequate revenue to manage an economic downturn without raising taxes or cutting services, according to a new study from Moody’s Analytics. If a moderate recession were to hit the U.S., the report shows, Florida would face a total shortfall equal to 5.6% of its total 2019 revenue. That’s the 10th worst outcome nationwide. The study estimates the fiscal shock of a moderate recession would equal 14.9% of the state’s 2019 funds. But Florida’s total balance of available funds is equal to 9.3%, according to the report, with just less than half designated specifically for a recession. Overall, 28 states are projected to have adequate revenue to weather a future downturn, with Wyoming, Alaska and North Dakota leading the way. Including Florida, 10 states are projected to have total shortfalls of more than 5% per state of total revenue. Business Observer Staff, *Business Observer*, February 21, 2020.

#### **5. FINRA ISSUES INVESTOR ALERT REGARDING REQUIRED MINIMUM DISTRIBUTIONS:**

The Financial Industry Regulatory Authority (FINRA) issued an Investor Alert regarding a new law raising the age for required minimum distributions (RMDs). A RMD is the amount an individual must take out of the traditional retirement savings plan to avoid tax penalties, once such an individual has reached the mandatory age for making withdrawals. The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 raises the mandatory age an individual must begin taking RMDs from 70 ½ years old to 72, unless such individual turned 70 ½ years old in 2019. The Investor Alert is available [here](#) Michael T. Foley, Susan Light and Jack A. West, Lexology, February 14, 2020.

#### **6. U.S. DEPARTMENT OF LABOR INVESTIGATION RESULTS IN AUSTIN RESTAURANT PAYING \$98,520 IN OWED WAGES, DAMAGES TO EMPLOYEES:**

After an investigation by the U.S. Department of Labor’s Wage and Hour Division (WHD), Polvos I LLC – doing business as Polvo’s Mexican Restaurant in Austin, Texas – has paid \$98,520 in back wages and liquidated damages to 19 employees to resolve overtime violations of the Fair Labor Standards Act (FLSA). WHD investigators found that Polvo’s Mexican Restaurant paid kitchen employees flat weekly salaries without regard to the

number of hours that they worked. This practice resulted in violations when employees worked more than 40 hours in a workweek, but the employer failed to pay them overtime. WHD also cited the employer for recordkeeping violations of the FLSA, and for failing to provide employees with information about the Family and Medical Leave Act. “Employers must pay their employees all the wages they have legally earned,” said Wage and Hour Division District Director Nicole Sellers in Austin, Texas. “The results of this investigation offer an opportunity for other employers to review their pay practices to make sure they comply with the law. The U.S. Department of Labor is committed to ensuring that employers have the information and tools they need to avoid costly violations like those found in this investigation.” The department offers numerous resources to ensure employers have the tools they need to understand their responsibilities and to comply with federal law, such as [online videos](#), confidential calls or in-person visits to local WHD offices. Employers that discover overtime or minimum wage violations may self-report and resolve those violations without litigation through the [PAID program](#). For more information about the [FLSA](#) and other laws enforced by the division, contact the toll-free helpline at 866.4US.WAGE (487.9243). Information is also available at <https://www.dol.gov/agencies/whd> including a [search tool](#) for workers who may be owed back wages collected by WHD. The mission of WHD is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation’s workforce. WHD enforces federal minimum wage, overtime pay, recordkeeping and child labor requirements of the Fair Labor Standards Act. WHD also enforces the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, the Family and Medical Leave Act, wage garnishment provisions of the Consumer Credit Protection Act and a number of employment standards and worker protections as provided in several immigration related statutes. Additionally, WHD administers and enforces the prevailing wage requirements of the Davis Bacon Act and the Service Contract Act and other statutes applicable to federal contracts for construction and for the provision of goods and services. 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.

**Contact:**

Juan Rodriguez

[972.850.4709](tel:972.850.4709)

[rodriguez.juan@dol.gov](mailto:rodriguez.juan@dol.gov)

**Contact:**

Chauontra Rideaux

[972.850.4710](tel:972.850.4710)

[rideaux.chauntra.d@dol.gov](mailto:rideaux.chauntra.d@dol.gov)

Release Number: 20-276-DAL, Wage and Hour Division, U.S. Department of Labor (DOL), February 11, 2020.

## **7. CUTTING FEDERAL BENEFITS TO ALIGN WITH PRIVATE SECTOR:**

In a recent article entitled [Task Force Proposes Eliminating FERS](#), we noted that a Task Force on government efficiency recommended a number of proposals that would impact the federal government's workforce, including eliminating the Federal Employee Retirement System (FERS) and replacing it with an enhanced version of the Thrift Savings Plan (TSP). The administration's 2021 budget proposal builds on this series of recommendations from the Task Force. The discussion on the budget that has been released noted that the [Congressional Budget Office found in a 2017 report](#) that there "is a 17-percent disparity on average, in total compensation, between Federal employees and their private-sector peers." These proposals would be significant changes to the federal benefits program and are all designed to reduce federal benefits to, as noted in the budget proposal, align federal benefits more closely with the private sector.

### **Proposals to Change Federal Benefits Package**

To change the current system and to bring federal pay and benefits in line with leading private sector practices, the Budget proposes the following changes in the federal employee benefits package:

1. increasing employee contributions to the Federal Employees Retirement System (FERS) such that the employee and employer would each pay half the normal cost;
2. eliminating the FERS Cost-of-Living Adjustment (COLA) and reducing the Civil Service Retirement System COLA;
3. eliminating the Special Retirement Supplement;
4. changing the retirement calculation from the [High-3 years](#) to [High-5 years](#); and
5. reducing the Thrift Savings Plan G Fund interest rate.

### **Eliminating or Reducing COLA's**

The budget proposal would eliminate the COLA for employees under the FERS system. It would reduce the COLA for CSRS retirees by 0.5 percent.

FERS and CSRS COLAs for annuitants are currently awarded based on statutory formulas tied to a Consumer Price Index. However, FERS annuitants are somewhat protected from economic effects because this retirement package includes Social Security

benefits and the Thrift Savings Plan in addition to the FERS annuity. As noted above, the rationale in the budget for eliminating the FERS COLA and reducing CSRS COLA payments is to bring compensation for federal employees closer to private sector benefits packages.

### **Eliminating the Special Retirement Supplement**

When a FERS employee retires before reaching eligibility for Social Security and meets employment longevity requirements, an employee currently receives a supplement in addition to the FERS annuity and TSP payouts. The supplement partially replaces the Social Security portion of the retirement package for federal employees under FERS.

### **Changing from a High-3 to High-5 Retirement Calculation**

Currently, Federal retirement annuity calculations are based on the average of the federal employee's three highest salary-earning years. Private sector pension companies commonly base employee annuity calculations on the employee's five highest salary-earning years as the longer time is more representative of an employee's career earnings track record. The budget proposal states that switching the federal employee annuity formula from a "High-3" to a "High-5" calculation would create greater alignment with the private sector.

### **Reducing the G-Fund Interest Rate**

This new budget proposal includes changing the interest rate paid to investors in the TSP's G Fund. The G Fund is a specialized fund only available through the TSP so, therefore, it is not available to investors in the private sector. G Fund investors currently benefit from medium-term bond interest rates on investments that are a short-term security. In other words, G Fund investors receive a higher interest rate than is normally available as there is less risk in short-term bonds. Basing the yield on a short-term Treasury bill rate instead of the current rate (an average of medium and long term Treasury bond rates) would reduce both the projected rate of return to investors and cost the government less money.

### **Summary**

In past budget proposals in recent years, similar proposals have also been made to the proposals in the 2021 budget. None of these significant changes have been included in the final budget. Chances are the same pattern will be repeated again this year and it is unlikely these proposals will become a reality. This does not mean there is no chance that any of them will pass. It is an election year, federal employees are often thought of as having better benefits than those available to private sector employees and predicting what will happen in Congressional negotiations on the budget are impossible to accurately

predict.

Ralph R. Smith, FedSmith.com, February 11, 2020.

## **8. WHO SPENDS THE LONGEST TIME IN RETIREMENT?:**

- Retirement lengths vary by country.
- There are now more people over the age of 65 than there are under the age of five.
- The World Economic Forum says pension savings must be incentivized ensure to better retirement outcomes.

For the first time, there are now more people over the age of 65 than there are under the age of five, a [World Economic Forum](#) report has found. As a result, there are fewer young people to support the growing number of pensioners around the world, requiring many people to retiring later than they planned The average expected length for retirement in OECD countries has remained mostly flat in recent years (staying put at around 20 years for women and 18 years for men). Still, lengths can vary widely thanks to factors such as a country's retirement age or life expectancy. Here are a selection of how retirement lengths stack up throughout the world.

### **25 years or more**

New OECD [statistics](#) show that French pensioners spend the longest time in retirement out of all OECD countries: [nearly 27 years for women, and just under 23 for men](#). Spain, Austria, Belgium and Italy closely follow France. Female retirees in these countries enjoy retirements of 25 years or more.

### **20 years or less**

South Koreans can expect around 10 fewer years of retirement than their French counterparts, with an average of around 16 years for women and 13 for men. Only Mexican men can expect a shorter retirement period than their Korean counterparts. The typical retirement age in Korea is also higher: around 68 years for men and 67 for women. Korea is also expected to [have one of the oldest populations](#) among OECD countries. Around half of these workers will be 50 and older by 2050.

### **A widening gap**

Though many will work longer than they plan, longer retirements can't always bridge retirement savings gaps. Among nations with large populations or sizable retirement savings markets, the gap stood at \$70 trillion in 2015 and is poised to grow. Unless key

measures are taken that gap will widen. According to the Forum's [Investing in \(and for\) our Future 2019](#) report, that number is forecast to reach \$400 trillion by 2050.

### **25 years or more**

New OECD [statistics](#) show that French pensioners spend the longest time in retirement out of all OECD countries: [nearly 27 years for women, and just under 23 for men](#).

Spain, Austria, Belgium and Italy closely follow France. Female retirees in these countries enjoy retirements of 25 years or more.

### **20 years or less**

South Koreans can expect around 10 fewer years of retirement than their French counterparts, with an average of around 16 years for women and 13 for men. Only Mexican men can expect a shorter retirement period than their Korean counterparts. The typical retirement age in Korea is also higher: around 68 years for men and 67 for women. Korea is also expected to [have one of the oldest populations](#) among OECD countries. Around half of these workers will be 50 and older by 2050.

### **A widening gap**

Though many will work longer than they plan, longer retirements can't always bridge retirement savings gaps. Among nations with large populations or sizable retirement savings markets, the gap stood at \$70 trillion in 2015 and is poised to grow. Unless key measures are taken that gap will widen. According to the Forum's [Investing in \(and for\) our Future 2019](#) report, that number is forecast to reach \$400 trillion by 2050. To bridge this gap across the OECD, personal pension savings will be key. The Forum's report stresses that policy-makers, employers and asset managers need to explore incentivizing contributions and optimize how these monies are invested. In some countries, [such as Singapore](#), this thinking has led to the creation of special accounts for housing or health care. In other countries, like the UK, age requirements for products such as annuities have been lifted, promoting savings. These and other creative savings approaches will be key in helping people achieve the best outcomes as retirements shorten and life expectancy lengthens.

Andrea Willige, World Economic Forum, February 19, 2020.

## **9. INFORMATION ON MEDICARE-DEPENDENT HOSPITALS:**

### **What GAO Found**

The Centers for Medicare & Medicaid Services (CMS) operates the Medicare-dependent Hospital (MDH) program, which assists hospitals that have 60 percent or more of inpatient days or discharges from Medicare patients, 100 or fewer beds, and that are generally

located in a rural area. MDHs receive an additional payment if their historic costs in one of three base years adjusted for inflation, among other things, are higher than what the hospital would have otherwise received under the inpatient prospective payment system (IPPS). In contrast, if the IPPS amount was higher than historic costs, the MDH would receive no additional payment. In fiscal year 2018, CMS paid approximately \$119 million in additional payments to MDHs. From fiscal years 2011 through 2017, the number of MDHs declined by around 28 percent. In addition, the number of MDHs that received an additional payment declined by around 15 percent. Over this period of time, MDHs also experienced a 13 percent decrease in the share of their Medicare revenue that came from inpatient services. In addition, there was a decline in the share of total MDH revenue that was attributed to Medicare patients, and a decline in Medicare profit margins by about 6 percentage points.

### **Why GAO Did This Study**

The MDH program was enacted in 1989, providing a financial benefit to some small, rural hospitals with high shares of Medicare patients. The original MDH program was established through statute for 3 years, and Congress has extended it on several occasions. The Bipartisan Budget Act of 2018 included a provision to extend the MDH program through 2022, as well as a provision for GAO to review the MDH program. This report describes, among other things, the changes that occurred in the number of MDHs and selected metrics over time. GAO analyzed data submitted to CMS by hospitals from fiscal years 2011 through 2017--the most recent year for which consistent data were available at the time of GAO's analysis--among other CMS data. GAO also reviewed CMS regulations and other agency documents. The Department of Health and Human Services provided technical comments on a draft of this report, which GAO incorporated as appropriate

Jessica Farb, [GAO-20-300](#), United States Government Accountabilities Office (GOA), February 2020.

### **10. UPDATE 1-BONDHOLDERS LOSE APPEAL OVER CLAIM IN PUERTO RICO PENSION SYSTEM ASSETS:**

A U.S. Appeals Court ruled that bondholders' claim on the assets of Puerto Rico's public employee pension system ended when the system filed for bankruptcy in May 2017. The Boston-based First Circuit Court of Appeals affirmed Federal Judge Laura Taylor Swain's June decision that bondholders' claim on employer contributions to the U.S. commonwealth's Employees Retirement System (ERS) did not extend into bankruptcy. The ruling is a further setback for owners of nearly \$3 billion of the system's bonds after a federal appellate court determined last year, they had a legally enforceable claim as of

December 2015 on assets pledged by the pension fund to pay off the debt. A lawyer for some of the bond funds that appealed Swain's ruling did not immediately respond to a request for comment. Puerto Rico's federally created financial oversight board commenced a form of municipal bankruptcy in 2017 to restructure about \$120 billion of debt and liabilities incurred by the Caribbean island's government and its entities. Prior to its bankruptcy filing, Puerto Rico's pension system liquidated almost all of its cash assets and the government moved to a pay-as-you-go system in which pension benefits are paid out of the island's general fund. The board said the appeals court decision "lifts a cloud" over the government's pension payments. "The commonwealth has no obligation to pay bondholders other than the value of encumbered assets in ERS when it commenced its case under Title III of PROMESA," the board said in a statement. PROMESA, the **Puerto Rico Oversight, Management and Economic Stability Act**, is a 2016 federal law that created the board and path for restructuring Puerto Rico's debt. A so-called plan adjustment the board filed in court for Puerto Rico's core government debt and pension liabilities included an 87% haircut or value reduction for ERS bonds. Meanwhile, bondholders are appealing Swain's denial of their motion for the appointment of a trustee to pursue ERS claims arising from the oversight board's role in the system's bankruptcy. Karen Pierog, Luis Valentin Ortiz and Matthew Lewis, Reuters, January 30, 2020.

#### **11. DID YOU KNOW SACHEL PAIGE SAID THIS?:**

"Work like you don't need the money. Love like you've never been hurt. Dance like nobody's watching."

#### **12. INSPIRATIONAL QUOTES:**

I've missed more than 9000 shots in my career. I've lost almost 300 games. 26 times I've been trusted to take the game winning shot and missed. I've failed over and over and over again in my life. And that is why I succeed. - Michael Jordan

#### **13. TODAY IN HISTORY:**

On this day in 1455, first record of Johannes Gutenberg's Bible, letter dated this day by Enea Silvio Piccolomini refers to the bible printed a year before.

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

Copyright, 1996-2020, 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.