

## **MISTAKE OF THE MONTH**

### **A Warning On Calculating Bonuses**

A bonus payment to employees over which an employee has no discretion generally has to be calculated into the employees' base pay over the period to which the bonus is attributable. Not doing so can create problems with the federal Department of Labor ("DOL") under the Fair Labor Standards Act ("FLSA"). According to the February 13, 2004 edition of the Daily Labor Report (BNA), Lyondell-Citgo Refining LLP settled a calculation of overtime case with the DOL for \$391,200 in back overtime payments for a group of refinery workers. The issue involved a nondiscretionary bonus which apparently had not been prorated back across the workweeks it covered in 2002. Thus it was not calculated into employees' overtime.

This is a common mistake. While the FLSA does not require than an employer pay a bonus of any sort, it does require that some bonuses be added to an employee's regular rate for the purposes of calculating overtime. An employer is not required to do this with so-called discretionary bonuses, where an employer retains the right to determine the fact and amount of a bonus and the employee has no legal right to it. On the other hand, where an employer tells employees that they will receive a bonus on "X" date, or that they will receive a year-end bonus if profits exceed 10% and profits do exceed 10%, then the employer has forfeited any discretion over that bonus. In such a case, the bonus must be prorated back over the time period to which it is attributable, added to employees' regular rate, and then overtime paid on that additional amount. This assumes, of course, that there were some overtime hours worked; if there were not any overtime hours worked, then it is six of one and a half-dozen of another. Also beware, however, that recalculation of the regular rate for that period may also impact benefit contributions.

## **EMPLOYERS AND CORPORATE GOVERNANCE**

### **Sarbanes-Oxley And Non-Profits**

Much has been written and said about the Sarbanes-Oxley Act ("SOA") of 2002. It generally applies to issuers of publicly traded securities such as stocks, and lays out a panoply of internal auditing and governance controls. Effective in 2004 is a requirement that CEOs, CFOs and other fiduciaries become fully responsible for statements made in their annual financial statements.

Former Massachusetts Attorney General Scott Harshbarger is heavily involved in corporate governance issues. He notes that while the SOA may by its terms apply only to publicly traded companies, the reality is that it sets a standard of internal controls for all companies, including non-publicly traded companies and non-profits. Those internal controls include "up the ladder" reporting requirements for accounting and other financial irregularities, internal audit committees, governance committees and internal financial control structure. Stakeholders, especially those of non-profit entities, are increasingly likely to view implementation of these controls as the "gold standard" in order to protect their stake. Non-

profits that are not responsive to this trend may face problems with their stakeholders, including their funding sources.

Attorney Harshbarger also reminds us that in Massachusetts, it is the Attorney General's office that has general oversight of charitable corporations, and that implementation of SOA standards, even if technically not legally required, can go a long way towards heading off an Attorney General investigation. "Good governance," said Attorney Harshbarger, "is good business." Moreover, many companies shy away from performing internal audits because they are afraid of what they might find. But an effective internal audit, even if it uncovers problems, is far better than ignoring problems and leaving them to fester and become disasters.

Thus being proactive is the better part of valor. It lets the company itself know whether or not it is being run properly, and it can identify issues that if addressed voluntarily in an appropriate manner can often deflect the zeal of state or federal investigators.

### **DOL ALJ Rules Sarbanes-Oxley Whistleblower Protections Extend To Employees Of Non-Public Subsidiaries Of Public Companies**

In *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ, 1/28/04), a federal Department of Labor Administrative Law Judge ("ALJ") ruled that an employee of a non-publicly traded subsidiary of a publicly traded parent was protected by the whistleblower protections of the Sarbanes-Oxley Act ("SOA"), and thus refused to dismiss a whistleblowing complaint brought against the subsidiary by the employee. The employee, the subsidiary's vice-president of finance, alleged that he was threatened and then fired by the subsidiary for reporting internal accounting deficiencies and exposing top management's efforts to manipulate financial results. The subsidiary sought to dismiss the complaint by arguing that the SOA only applied to publicly traded companies, and thus while it may apply to the parent company, it did not apply to a non-publicly traded subsidiary.

The ALJ disagreed and allowed the complaint to proceed. He reasoned that Congress intended to include in the SOA's whistleblower protections anyone employed under the corporate umbrella of a covered parent, whether the subsidiary was publicly traded itself or not. He relied on the deterrent value of having such whistleblowers covered, and that extending coverage to employees of non-publicly traded subsidiaries furthered the public purpose of the SOA of buttressing investor confidence in the integrity of financial markets.

We expect that this decision will run the full gamut of appeals, particularly since it well may be a somewhat strained interpretation of the SOA, which explicitly applies only to employees of publicly traded companies.

## **AT THE SUPREME COURT**

### **Under ADEA, Employers Apparently May Favor Older Workers Over Younger**

As we reported last December, under a collective bargaining agreement ("CBA") between General Dynamics and the United Auto Workers, only employees who reached age 50

by July 1, 1997 were eligible for retiree health benefits; the plaintiffs were between the ages of 40 and 49 as of that date and so were not eligible for retiree medical benefits. Plaintiffs claimed that it was unlawful reverse age discrimination to favor older employees over younger employees when those younger employees were still within the Age Discrimination in Employment Act's ("ADEA") protected category of being 40 or more years of age.

On February 24, 2004, a divided Supreme Court disagreed and reversed the decision of the 6<sup>th</sup> Circuit Court of Appeals, which in turn had reversed the decision of the District Court in favor of the Defendant. *General Dynamics Land Systems, Inc. v. Cline*, 2004 U.S. LEXIS 1623 (U.S.Sct. 2004). The Supreme Court ruled that the intent of the ADEA was to protect "a relatively old worker from discrimination that works to the advantage of the relatively young," not necessarily to preclude age as the basis for employer decision making. Justice Souter, writing for the majority, stated that "age" means "old age" when read in the context of a statute barring discrimination.

The dissents, written by Justices Thomas and Scalia, agreed with the plaintiffs in the case, writing that the plain language of the ADEA, which expressly bars discrimination against any individual "because of such person's age," plainly meant anyone 40 or older adversely affected by an employment decision based on age could sue.

An unusual coalition of employer and union groups supported General Dynamics' position in this case, mostly because the alleged discrimination was the result of a collectively bargained labor agreement. While the discussion in the case was extensive, the upshot appears to be that it is lawful under the ADEA to favor older workers over younger workers, although it is likely the full impact of this decision will have to be explored in future court cases.

## **OTHER EMPLOYMENT LAW HEADLINES**

### **Alcoholism Not A "Disability" Under ADA**

In *Sullivan v. Neiman Marcus Group*, 2004 U.S. App. LEXIS 2430 (1<sup>st</sup> Cir., 2/13/04), the plaintiff had a history of problems with alcohol but also had a "long and seemingly successful employment history in the retail sector." In August, 1999, he apparently became intoxicated while at lunch with some fellow employees. Later that same day one of his supervisees resigned, claiming that the plaintiff frequently drank at work and was drunk during the day and abused the supervisee when he drank. A search of the plaintiff's desk turned up an empty bottle of vodka. Plaintiff was then terminated. Plaintiff sued, claiming he was disabled by his alcoholism and was entitled to a reasonable accommodation, and/or that the employer unlawfully perceived him as disabled because of his alcoholism. The District Court entered summary judgment in favor of the employer, and this appeal followed.

The Court first noted that alcoholism was an "impairment" under the Americans with Disabilities Act ("ADA"). However, mere impairment without more is insufficient to establish that a claimant is disabled under the ADA. In order to have a viable claim, a plaintiff must demonstrate that his impairment substantially limits one or more of his major life activities, which plaintiff claimed here was working. The Court noted the conceptual problem in a plaintiff claiming that working was the major life activity substantially limited by an impairment because

“[b]y demonstrating that his ability to work is substantially impaired, [a plaintiff] may demonstrate that he is unqualified for the job and, therefore, excluded from ADA protection. If he does not introduce such evidence, however, he may fail to show that he was substantially impaired.”

Here, the plaintiff actually “presented significant evidence demonstrating that his alcoholism has not interfered with his ability to work.” When asked in his deposition whether his “alcoholism limits [him] in any way from doing just things in life generally,” plaintiff replied that “if it was untreated . . . it could begin to affect my professional life” and that “I wouldn’t be at my peak performance levels.” Plaintiff also testified that he worked successfully at other jobs both before and after his time at defendant’s. Thus the Court ruled that the Plaintiff was not disabled because he could not show that he was substantially limited in the major life activity of working. With respect to his “perception” claim, the Court wrote that it previously had rejected the same argument, and that “[a] plaintiff claiming that he is ‘regarded’ as disabled cannot merely show that his employer perceived him as somehow disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA.” Similarly, plaintiff failed to present any evidence beyond his own termination demonstrating that the defendant may have believed that he could not perform the essential functions of either a class of jobs or a broad range of jobs in various classes. Thus the Court affirmed the District Court’s grant of summary judgment in favor of the employer.

### **Inability To Work On SWAT Team Not “Substantial Limitation”**

In a somewhat similar case decided recently by the Massachusetts Supreme Judicial Court (“SJC”) under the state anti-discrimination law, G.L. c. 151B, *City of New Bedford v. MCAD*, 440 Mass. 450 (12/3/03), the plaintiff police officer was placed on leave after he shot and killed a suspect. At the time the plaintiff was a member of the department’s SWAT teams. He was cleared of wrongdoing after a lengthy internal investigation and returned to duty. The Chief, however, refused to return him to duty on the SWAT teams, as he was concerned about the plaintiff’s ability to deal with stress and his emotional instability, a concern shared by other members of the SWAT team. The case has a somewhat tangled procedural history, but the upshot was that the parties agreed to arbitrate his MCAD complaint that he had been discriminated against on the basis of a perceived disability; the arbitrator found in favor of the plaintiff, as did the Superior Court on appeal. The basic rationale was that the City perceived the plaintiff as being disabled by his stress and emotional instability and did not provide a legitimate, nondiscriminatory reason for refusing to return him to SWAT team duty.

The SJC reversed. The Court, while seemingly skeptical of the claim, assumed for the purposes of argument that the plaintiff had shown that he suffered from an “impairment,” and assumed that he had shown that working was the substantially limited major life function in the case. The Court then found that, at worst, the City only regarded the plaintiff as being unable to perform the duties of a SWAT team member, and did not perceive the plaintiff as being unable to perform “a class of jobs or a range of jobs in various classes.” Thus, wrote the Court, “[a] perception that an employee is unable to perform only a particular aspect (SWAT team membership) of a single particular job (New Bedford Police Officer) is not sufficient to satisfy

the 'substantial limitation' requirement of the statute." Thus the Court ordered the entry of final judgment in favor of the City.

### **Reassignment Calling For Acquisition Of New Skills Not "Adverse Action"**

In *Tran v. Trustees of the State Colleges in Colorado*, 355 F.3d 1263 (10<sup>th</sup> Cir., 1/27/04), the plaintiff computer programmer complained of sexual harassment by a supervisor. The college then reassigned her to another supervisor who headed up a web team. Later she complained that this supervisor's "style was too informal" and she again was reassigned to a more structured setting. After four months she was promoted. She then received a "corrective action" based on absenteeism and other deficiencies. This notice was later removed from her file and her absences designated as FMLA leave. She received other corrective actions, filed grievances as to them all, and then resigned. She sued, claiming sexual harassment and retaliation. The District Court granted the college's motion for summary judgment and she appealed, pursuing only her retaliation claim.

The factual basis for plaintiff's retaliation claim was that, as a result of her sexual harassment complaint against her supervisor, she was reassigned to work under the supervision of the College's "web manager," and was later reassigned to work under the supervision of the College's "Student Information Systems Coordinator." According to the Plaintiff, these reassignments constituted adverse employment actions sufficient to establish a *prima facie* case of retaliation, and the College's explanations for the reassignments were pretextual. However, neither of the transfers resulted in a loss of employment, compensation, or benefits. Thus, plaintiff articulated as "adverse" the facts that her first reassignment was adverse because she was not qualified to work on the "web team" and was not provided with sufficient training or adequately structured work assignments. Despite this, the Court found that her supervisor gave her an "above standard" and "commendable" on her evaluations this period. Thus the Court wrote that "[u]nder these circumstances, requiring an employee to develop new skills is not the kind of adversity that can support a *prima facie* case of retaliation, especially in a rapidly evolving field such as computer programming." Nor did the College's delay in integrating the plaintiff into the "web team" and providing her with more structured training and work assignments create an adverse change in her job responsibilities under these circumstances. Thus the Court affirmed the District Court's entry of summary judgment in favor of the employer.

### **"Obvious" Disability Appropriate Subject Of IME Request Under ADA**

In *Rosenquist v. Ottoway Newspapers*, 2004 U.S.App. LEXIS 1580 (2<sup>nd</sup> Cir., 2/3/04), the plaintiff, a reporter for the Plattsburgh Press-Republican, suffered a stroke resulting in, among other things, diminished cognitive function and speech ability. In early 1997, after a long hospitalization and intensive rehabilitation, he applied for reinstatement to his former position. He provided the defendant with a letter from his own physician indicating that the doctor would not object to the plaintiff's returning to work, but making no reference to his ability to do the particular job he sought. The defendant asked the plaintiff to undergo an independent medical examination to determine whether he was capable of performing the essential functions of the political reporting job, which was the only reporting job arguably open. When, in July 1997, a

neurologist determined that plaintiff was unable to do so, with or without reasonable accommodations, the defendant informed plaintiff that he would not be able to return to the paper as a political reporter at that time. Plaintiff was invited to keep the management apprised of his medical progress, so that they might consider him for positions in the future.

On appeal, plaintiff contended that the independent medical examination (“IME”) ordered by the defendant was an unlawful medical inquiry, prohibited by the ADA. The 2<sup>nd</sup> Circuit Court of Appeals agreed with the District Court that the defendant's decision to require an IME was justified by business necessity. Because plaintiff had suffered an aneurysm with “obvious effects on speech,” the defendant had a reasonable basis to doubt the plaintiff’s ability to perform the essential functions of a reporter. Insofar as plaintiff contended that the defendant's failure to reinstate him constituted discrimination based on disability, the plaintiff did not produce enough evidence to permit a jury to find that the defendant did not act in good faith in selecting the independent medical examiner, in providing him with a description of the political reporter position, and in crediting the examiner's conclusion that, at the relevant time, plaintiff was incapable of performing the essential functions of his former job, with or without reasonable accommodation.

Finally, insofar as the plaintiff alleged that defendant failed reasonably to accommodate his disability, his claims also were unavailing. The Court wrote that there was no indication in the record that there was a reasonable accommodation that would have allowed plaintiff to perform the essential functions of the job at the time that he applied for reinstatement.

### **Investors Can Be The “Employer” Under The WARN Act**

The Workers Adjustment and Retraining Notification Act (“WARN”) generally requires an employer to give employees at least 60 days notice of a plant closing or mass layoff. In *Vogt v. Greenmarine Holding*, 2004 U.S. Dist. LEXIS 1196 (S.D.N.Y., 1/29/04), a company called OMC filed a bankruptcy petition and at the same time closed its facilities without 60 days notice to employees. Because OMC was in bankruptcy and protected by the automatic stay, it was not feasible to sue OMC. The plaintiffs, a group of former OMC employees, instead sued a group of eight investment companies that owned the majority of OMC stock.

The employees argued that these investors and OMC were a “single employer” for purposes of the WARN Act for three reasons. First, plaintiffs alleged that defendants owned or controlled a majority of OMC's stock and “controlled all corporate transactions of OMC.” Second, plaintiffs alleged that the defendants and OMC were part of a single integrated structure because the same individuals who were on the boards of various defendant companies were also directors of OMC at the time OMC petitioned for bankruptcy. Third, plaintiffs argued that the defendant companies were directly liable under WARN as parents of OMC, because, they alleged, certain defendant companies had the authority to and did make the decision that OMC petition for bankruptcy and effect the mass layoff in violation of the WARN Act.

The defendants moved to dismiss the complaint and basically argued that the defendant companies were mere investors in OMC, not joint-employers with OMC, and acted the way parent companies commonly act in regard to a subsidiary. They also argued that no extraordinary circumstances exist which would make them liable for the acts of OMC in

petitioning for bankruptcy and shutting down its facilities.

Because this was a motion to dismiss, the Court had to accept as true all the allegations in the complaint for purposes of the motion. The Court found that the plaintiffs had alleged sufficient interrelationships among the investors and the company, and in particular had alleged sufficient decision-making on the part of the investors, to permit the claim to move forward. The Court found that the combination of common ownership, common directors and/or officers, control of the ultimate decision to close, and the investors' "de facto" control of OMC, would be sufficient if proven at trial to permit the imposition of WARN liability on at least some of the defendants. Thus the Court denied the investors' motion to dismiss.

### **Similarly, A Successor Employer May Be Liable Under WARN Act**

On a similar note, even lawyers can get into these fixes. In *McCaffrey v. Brobeck, Phleger & Harrison*, 2004 U.S. Dist. LEXIS 2768 (N.D. Cal., 2/17/04), the defendant law firm Morgan Lewis essentially took over most of the former Brobeck law firm, and took on many of the partners, associates and support staff, as well as the firm's lease and office equipment and other assets. The rest of Brobeck's former employees were terminated without the 60 day WARN notice. Those employees sued both firms and claimed one or the other had been required to give the 60 day WARN notice. Since Brobeck was gone, they focused their attention on the successor Morgan Lewis.

For purposes of the motion Morgan Lewis did not dispute that plaintiffs were entitled to WARN notice; rather Morgan Lewis contended that Brobeck, not it, was plaintiffs' employer and so Brobeck, not it, was obliged to provide the notice. Plaintiffs argued that Morgan Lewis could be held liable for failing to provide the notice based on a provision of the WARN Act that makes a purchaser of all or part of an employer's business responsible for providing notice for any plant closing or mass layoff that occurs after the effective date of the sale. Morgan Lewis moved for summary judgment on the WARN claim.

The Court noted that Morgan Lewis did more than just purchase some of Brobeck's assets. Morgan Lewis also leased Brobeck's former premises, purchased access to Brobeck's informational infrastructure, obtained access to Brobeck's client files, and emphasized lawyer continuity in press releases geared toward convincing Brobeck's clients to become Morgan Lewis's clients. Thus, although Morgan Lewis neither assumed Brobeck's liabilities nor acquired its accounts receivable, Morgan Lewis did put together a series of transactions that allowed many of the same lawyers to practice law using much of the same infrastructure with the explicit hope that this would allow it to acquire Brobeck's clients. Thus, wrote the Court, a reasonable jury could find that there had been a sale of a business or part of a business sufficient under the WARN Act to make Morgan Lewis the party who should have given the WARN notice, and summary judgment on this issue was denied.

### **Connecticut High Court Rejects "Compelled Self-Defamation" Theory**

In *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210 (1/6/04), an apparently long-running case with tangled facts in the federal and state courts in Connecticut, the plaintiff had been terminated for altering, or causing to be altered, his return to work date on a doctor's letter. He

claimed that he then felt “compelled” to tell prospective employers “over and over” about the defendant’s defamatory statements that he had altered a doctor’s letter when asked why he had been terminated. He sued in federal court for various claims including wrongful termination and defamation. A federal jury found in his favor on his defamation and breach of contract claims.

The employer appealed to the 2<sup>nd</sup> Circuit Court of Appeals, which in turn certified questions of Connecticut law to the Connecticut Supreme Court. Our specific question was “Does Connecticut recognize a cause of action for defamation based on a plaintiff employee's or former employee's compelled self-publication of a defendant employer's or former employer's defamatory statements made by the employer or former employer only to the employee or former employee?”

The Court’s answer was “no.” It noted first that most of the jurisdictions which have addressed the issue have rejected the theory on a number of grounds. The Court wrote, however, that “[t]he most compelling public policy consideration against recognition of the doctrine is that acceptance of the doctrine would have a chilling effect on communication in the workplace, thereby contradicting society's fundamental interest in encouraging the free flow of information.” The Court also noted a series of other reasons to reject the doctrine, including the actual harm caused by its encouraging a lack of constructive criticism in the workplace, and limited and essentially useless information provided to prospective employers by prior employers. Thus the Court rejected the compelled self-defamation doctrine in Connecticut.

## **WAGE & HOUR/FMLA DEVELOPMENTS**

### **FLSA “Independent Judgment” Constrained By Highly Regulated Nuclear Power Plant Environment**

In *Schaefer v. Indiana Michigan Power Co.*, 2004 U.S.App. LEXIS 2414 (6<sup>th</sup> Cir., 2/13/04), the plaintiff was a nuclear waste environmental specialist who claimed that he was not an exempt administrative employee and thus entitled to overtime for hours worked over 40 in a week. The employer, relying principally on the position job description, noted that the plaintiff was responsible for a variety of “activities in addition to actual shipping, such as writing and revising procedures, preparing position papers, investigating corrective actions, and surveying other nuclear facilities as to how they deal with radioactive waste.” Thus according to the employer, the plaintiff exercised a substantial amount of discretion and independent judgment in these tasks. The plaintiff, on the other hand, testified in his deposition that 80% of his time was spent preparing waste shipments, an activity highly regulated and constrained by the federal government, so that for the most part he exercised no discretion or independent judgment at all.

The District Court ruled in the company’s favor, but the 6<sup>th</sup> Circuit Court of Appeals reversed and sent the case back for a trial. The Court noted that a job description does not control exempt status, rather it is what the employee actually does. Here, the employee’s testimony was that his primary duty was highly regulated by federal waste disposal regulations and company policies, and there does not appear to have been much contrary testimony from anyone who observed his job functions on a daily basis. Extensive knowledge of the regulations that allowed the plaintiff to do his work more efficiently did not mean that he exercised

discretion or independent judgment, wrote the Court; in fact, using his memory to apply the regulations did not make his actions the product of either discretion or independent judgment. Thus there was sufficient evidence in the record in support of the plaintiff's claim to reverse the District Court's grant of summary judgment. In fact, the dissenting judge would have granted summary judgment in favor of the plaintiff

The moral here is that you can have all the fancy and detailed job descriptions you want, but if they do not reflect the actual job duties and tasks accurately then they are useless insofar as lending help in defeating a FLSA claim.

### **Raising Poor Performance As A Reason For Termination After Suit Is Filed Is A Bad Idea**

It's the old story. In *Batka v. Prime Charters Ltd.*, 2004 U.S. Dist. LEXIS 1436 (S.D.N.Y., 2/4/04), the plaintiff was hired in 1997 by the defendant, a securities firm. She received quarterly raises, and in 1999 was promoted, and thereafter also received regular raises; she was never written up or spoken to for poor performance or absenteeism. In December of 2000, she told her supervisor she was pregnant and would be taking maternity leave that spring/summer, but would return. On May 15, 2001, she told her supervisor that because of medical complications her leave would begin immediately and last until August 13, 2001. While the plaintiff was out on maternity leave, approximately two weeks prior to her anticipated return date, defendant sent her a severance package. When she called her supervisor to inquire why she was being terminated, she was told that termination was a result of staff reductions brought on by a downturn in the economy. Nothing was said of poor performance. She sued, principally claiming that she was terminated in violation of the FMLA but also alleging sex discrimination. The employer defended by claiming that plaintiff was one of 23 employees laid off as a result of a downturn in the securities business, and that she was selected because she was a poor performer and had problems with absenteeism.

The Court first noted that there was an absence of any negative performance evaluations or comments in the plaintiff's file, she had received regular raises, she had been promoted, and at least her own testimony was that she had never been told of any performance or absenteeism issues during her employment. It also noted that it was not until litigation had begun that the poor performance issue arose. On her sex discrimination claim, the Court ruled that she had made out a prima facie case, the employer had articulated a legitimate non-discriminatory reason for terminating her (layoffs due to economic situation), but also that she had produced enough circumstantial evidence of discrimination (bad timing and alleged performance issues unsupported by her history of employment) to raise a disputed issue of material fact that a jury, rather than the Court, would have to decide. On her FMLA claim, the Court ruled that because she had made out a case of sex discrimination under the law's more rigorous standard applicable to such cases, she also had made out her FMLA claim. Thus the Court denied the employer's motion for summary judgment.

## **LEGISLATIVE AND REGULATORY ACTIONS OF NOTE**

## **Fiduciary Guidance Issued By Federal Department Of Labor**

In light of the recent problems in the mutual fund industry, on February 17, 2004, the federal Department of Labor's Employee Benefits Security Administration ("EBSA") issued a guidance statement on the general responsibilities and duties of pension fund fiduciaries. While it specifically addressed the obligation to review investments with respect to possible late-trading and market-timing abuses, it also is a good overview of a fiduciary's responsibility generally.

ERISA generally requires fiduciaries to act prudently, and emphasizes that prudence requires a "deliberative process," not just accepting at face value what consultants or plan advisors recommend. Prudence also requires not only access to sufficient information to make informed decisions, but actually having such information. If the fiduciary is not given sufficient information, then depending on the circumstances the fiduciary may have an obligation to seek out that information him or herself. In the context of mutual fund investments by a plan, for example, fiduciaries should take steps sufficient to determine whether or not a particular fund in which a plan is invested, or is considering investing in, has sufficient procedures and safeguards in place to limit the fund's vulnerability to abuse.

EBSA's guidance can be found on their website at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

## **IRS Website Adds Retirement Tax Scam Section**

On a similar note, the federal Internal Revenue Service ("IRS") announced on February 11, 2004, that it had implemented a new section on its website to provide information on abusive tax shelter schemes and transactions involving employee retirement plans.

This information is at the IRS website at [www.irs.gov/retirement](http://www.irs.gov/retirement).

## **H-1B Visa Allotment Filled For FY 2004**

On February 17, 2004, the federal Department of Homeland Security ("DHS"), which is now responsible for employment-based visa petitions, announced that it would begin returning new H-1B visa petitions because the fiscal year 2004 cap of 65,000 had been reached. Petitions for H-1B visa for fiscal year 2005 may not be filed until April 1, 2004, and that employee must have a start date of October 1, 2004 or later. H-1B petitions have dropped off in the last couple of years, and last fiscal year's cap of 195,000 was not even reached. Petitions for extending current H-1B status and those seeking a change of employer for existing H-1B holders will continue to be processed.

## **ON THE EMPLOYEE BENEFITS FRONT**

### **Disability Plan Could Offset Retirement Benefits**

In *Fuller v. Liberty Life Assurance of Boston*, 2004 U.S. Dist. LEXIS 2184 (D.C.N.C., 2/13/04), the employee was granted a long-term disability benefit retroactive to the expiration date of her short-term disability benefits. Prior to this award but after expiration of the short-term disability payments, however, she elected a lump sum retirement benefit from her retirement plan. When Liberty Life discovered the lump sum payment, it offset those monies

from her disability payments. The disability plan had a provision offsetting disability benefits from other income, and specifically included retirement benefits. When the plaintiff refused to reimburse the plan, it offset future payments. Plaintiff sued, arguing first that she elected the lump sum while she was not receiving disability benefits, and second that the defendant in effect was trying to recover her lump sum retirement benefit, which violated ERISA's bar on forfeiture of nonforfeitable benefits.

The Court ruled that because the plan had made the grant of long-term disability benefits retroactive, and thus the plaintiff in fact did receive disability benefits covering the time she elected the lump sum retirement benefit, she had received income while collecting disability, and so the plan's offset provisions did cover her and the offset was lawful under the plan. As to her claim of forced forfeiture of nonforfeitable retirement benefits, the Court ruled that even nonforfeitable benefits can be reduced by other income under ERISA, and in any event the disability plan was reducing disability benefits, not retirement benefits.

### **IBM On Hook For Retroactive Relief In Cash Balance Conversion**

In this soon-to-be long-running saga over IBM's conversion of its defined benefit plan to a cash balance pension plan, the District Court has now ruled that participants in the plan are entitled to retroactive relief as well as prospective relief. *Cooper v. IBM Personal Pension Plan*, 2004 U.S. Dist. LEXIS 2415 (S.D. Ill., 2/12/04). The Court previously had ruled last year that IBM violated ERISA's bar on age discrimination by adopting a cash balance plan that had the effect of reducing benefits for older employees. In this part of the case, IBM argued that it was blind-sided by what it characterized as a "drastic" and "startling" change in the law and thus any relief ordered should not be retroactive, but prospective only.

The Court disagreed. It noted that ERISA's prohibition on age discrimination in plans existed long before the current phenomenon of cash balance plans, and thus its decision was not unique or any change in the law, just the application of well-settled law to a more current set of facts. As the Court wrote, "[a]ll that has changed is IBM's clever, but ineffectual, response to law that it finds too restrictive for its business model."

### **Retirement Incentive Not Under "Serious Consideration" When Employees Retired**

In *Peterson v. AT&T*, 2004 U.S. Dist. LEXIS 854 (D.N.J., 1/9/04), a group of managerial employees took advantage of a "special update" retirement plan program and retired shortly before January 1, 1998. The company had told these employees that this option would be a better deal than that then existing under the plan for the next 4-6 years; the plan recently had converted to a cash balance plan. Concurrently, in December, 1997, the CEO asked Human Resources to develop a plan to reduce AT&T's workforce. In early January, 1998, HR developed a plan (the VRIP plan) which included an enhanced early retirement benefit greater than the "special update" program. This plan was then presented to a senior management meeting on January 14, 1998. Its development was approved by the Board of Directors on January 21, 1998, and it was finally approved on March 18, 1998.

Employees who had elected to retire prior to January 1, 1998 and had taken the "special

update” option then sued, claiming that AT&T breached its fiduciary duties under ERISA by failing to inform them that a better plan was in the offing. The Court determined that the proper test was whether or not the VRIP plan had been under “serious consideration” at the time the plaintiffs retired. The Court ruled that the VRIP plan could not have been under serious corporate consideration until, at the earliest, January 14, 1998, when it was first presented to senior management; merely being in the development state in HR was not enough to constitute “serious consideration” because HR was not the decisionmaker.

With respect to the employees’ claim that the “special update” program had been misrepresented to them as providing the greatest benefit over the next 4-6 years when in fact the VRIP plan was in the wings, the Court held that the same “serious consideration” test applied, and the VRIP was not under serious consideration at the time this representation was made. Moreover, added the Court, the statement was not a misrepresentation, but only an inaccurate prediction. At the time it was made, AT&T had “every reason to believe” that the representation was correct “and should not be held liable because unexpected future actors and future decisions proved those predictions inaccurate.” Thus the Court entered summary judgment on behalf of AT&T on most of the case. Notably, it did not dismiss claims of two employees, each of whom asserted that AT&T represented to them that if the pension plan were every improved they would be eligible for any such improvement. If true, wrote the Court, this could constitute an active misrepresentation for which the employees could recover.

### **New Standard Of Review For Decisions Of Plan Administrators Who Have Conflict Of Interest**

In *Fought v. UNUM Life Ins. Co.*, 2004 U.S.App. LEXIS 1880 (10<sup>th</sup> Cir., 2/6/04), the plaintiff had elective heart surgery in 1999, then complications - a staph infection - for which she spent some time in an intensive care unit. The disability plan denied her claim under the plan for treatment of the staph infection, asserting that a cause of the infection was her pre-existing heart condition and thus excluded from coverage. She filed an action in federal District Court, claiming that the plan’s denial of benefits was arbitrary and capricious. The District Court ruled in favor of the plan and found that the plan administrator’s decision was not arbitrary and capricious.

The 10<sup>th</sup> Circuit Court of Appeals reversed. The Court found that the District Court had applied the wrong standard of review. The Court noted that there is a conflict of interest where a third-party insurer also acts as the plan administrator, and that this type of conflict of interest was sufficiently severe to trigger a higher standard of review. Thus it fell to the plan administrator to establish “by a preponderance of the evidence that the denial is warranted,” rather than it being up to the plaintiff to establish that the plan administrator acted arbitrarily and capriciously. Here, the plan administrator’s reading of the pre-existing condition exclusion might have been “overly broad” because “the disabling condition must be substantially or directly attributable to the pre-existing condition” and not simply “one in a series of factors that contributes to the disabling condition”. The staph infection was an injury distinct from the underlying heart disease, the Court found, and thus it reversed the District Court.

## **ON THE LABOR FRONT**

## **Batter Up!**

Since Spring Training is here in the baseball world, it seemed appropriate for the 3rd Circuit Court of Appeals to issue its decision affirming an arbitration award that ordered professional baseball to reinstate 9 of 22 umpires who previously had resigned in a labor dispute. *Major League Umpires Association v. American League of Professional Baseball Clubs*, 2004 U.S. App. LEXIS 2563 (3<sup>rd</sup> Cir., 2/17/04).

In 1999, the umpires disputed new policies implemented by the Commissioner of Baseball, claiming they violated the parties' collective bargaining agreement. The union tried to persuade the league to bargain over these issues, to no avail. In an attempt to force negotiations, but stymied by the contract's no-strike provision, 57 of the 68 umpires sent resignation letters on July 15, 1999, to be effective on September 2, 1999. In response, the league started hiring replacement umpires, whereupon many of the umpires attempted to rescind their resignations. In the American League, because of the new hires, there were not enough open positions for all the returning umpires, and thus 9 were left without jobs. In the National League, the President of the League applied the "skill and merit" provision of the contract in determining whom to accept rescissions from, and ultimately 13 lost their jobs. All 22 filed grievances under the contract. In 2001, an arbitrator ordered the reinstatement of 9 of the 22 because of an "inconsistent" application of the "skill and merit" criteria; both the union and the league appealed.

The union argued that the letters were only notices of an "intent" to resign and not actual resignations, and thus the league's refusal to accept their rescissions amounted to a "discharge" under the contract. The Court, agreeing with the leagues and the arbitrator, wrote that the letters explicitly stated that "I hereby resign my employment," and the union's general counsel made media statements that the umpires had resigned and would not rescind those resignations. That was enough, according to the Court, to support the arbitrator's determination that all the umpires had resigned.

On the other hand, the union claimed, and the arbitrator and the Court agreed, that the National League had been inconsistent in assessing each umpire's "skill and merit" when considering whether or not to accept his resignation. Thus 9 of the 22 were entitled to reinstatement as the arbitrator had ordered.

## **Company Ordered To Return Transferred Work And Rehire Laid Off Workers**

In *Ganton Technologies, Inc. v. United Auto Workers*, 2004 U.S.App. LEXIS 2313 (7<sup>th</sup> Cir., 2/12/04), Prior to 1999, Ganton owned and operated two machining and die casting facilities in Racine, Wisconsin. In 1999, Ganton became a wholly-owned subsidiary of Internet Corp. Ganton continued to own and operate its Racine facilities, although they now did business as "Internet Racine Machining" and "Internet Racine Plant." The employees of the two Racine plants were represented by the Union both before and after Ganton became a wholly-owned subsidiary of Internet. On February 14, 2000, the parties executed a new collective bargaining agreement entitled "Labor Agreement between Internet Racine Machining, Internet Racine Plant and International Union, United Automobile, Aerospace and Agricultural Implement

Workers of America (UAW) Local Union No.627." The definition of "Company" in the contract, however, essentially continued to refer only to Ganton as the Company. The contract further provided that "[t]he Company agrees that they will not move any production from its Racine facilities to any other Company owned facility, if such transfer of work results in any job losses in Racine."

Ganton transferred work from Racine to various Internet-owned facilities and laid off a number of employees. The union grieved and then sought arbitration. The arbitrator ruled in favor of the union, and held that the company, by transferring work to other facilities of its parent, had violated the contract because "Company" under the contract included all facilities owned by Internet. Thus the arbitrator ordered the company to bring back the work and rehire all the laid-off employees.

For some reason, perhaps pressure from the parent Internet, Ganton never made the obvious argument in arbitration that Ganton was the "Company" under the contract and Internet was not, so that transferring work to Internet-owned facilities did not violate the contract because they were not "Company" owned. In court, Ganton tried to raise this argument, but the 7<sup>th</sup> Circuit found that the company had waived the argument by not raising it in the arbitration and thus could not raise it on appeal. Thus the arbitrator's decision and award stood and the Company must reinstate the work and rehire the laid off employees.

### **"Intemperate" Language Was Protected Conduct Under the NLRA**

Yes, according to the National Labor Relations Board ("Board"), calling your supervisor a "racist" and a "bastard red-neck son of a bitch" can be protected conduct under the National Labor Relations Act ("Act"). In *Media General Operations*, 341 NLRB No. 18 (1/30/04), in a group meeting discussing work performance, an African-American pressman called both his Caucasian supervisor and the newspaper employer "racist." After being reprimanded shortly thereafter by the supervisor; the employee again called the supervisor and the paper racist and the supervisor told him he was suspended. On his way out of the plant, the employee called the supervisor a "bastard red-neck son of a bitch" in front of at least one other employee. He was terminated and this case ensued.

The Board first noted that it is conduct protected by the Act to speak up about workplace conditions and unfair treatment of employees. Whether the employee then lost the Act's protection is based on four factors: the place of the discussion, the subject matter, the nature of the statement(s) and whether or not the statement(s) was provoked by unfair labor practices. Here, the Board found that the employee's comments were protected because they were made in the course of protesting unfair workplace treatment, and the later "racist" comment in the supervisor's office was a continuation of that discussion and not overheard by other employees. The supervisor telling the employee that his behavior was unacceptable and would not be tolerated and sending him home thus was an unfair labor practice. The "red-neck" comment also was protected because it still was a continuation of the protest of unfair treatment, which now included the unlawful threat and suspension. The Board wrote that "the Act allows a certain degree of latitude to employees when engaged in otherwise protected conduct, even when employees express themselves intemperately." Thus the employer was ordered to reinstate the

employee with back pay.