

## ***MISTAKE OF THE MONTH***

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

A common but potentially expensive mistake.

## **EMPLOYERS AND CORPORATE GOVERNANCE**

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

Former Attorney General Scott Harshbarger advises that non-profits should pay attention to Sarbanes-Oxley, it is likely to be the new gold standard in governance.

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

Sarbanes-Oxley whistleblower protections appear to be extended.

## **AT THE SUPREME COURT**

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

A divided Court rules younger (but over 40) workers can be denied benefits available to older workers.

## **OTHER EMPLOYMENT LAW HEADLINES**

### **Alcoholism Not A “Disability” Under ADA**

Plaintiff could work, thus his alcoholism did not “substantially limit” his major life function of working.

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

Similarly, an inability to perform only a particular aspect of a single particular job is not sufficient to satisfy the “substantially limit” requirement of the statute.

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

Requiring an employee to develop new skills is not the kind of adversity that can support a *prima facie* case of retaliation.

### **“Obvious” Disability Appropriate Subject Of IME Request Under ADA**

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.

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

Plaintiffs had alleged sufficient interrelationships and decision-making on the part of the investors to permit WARN liability.

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

On a similar note, even lawyers can get into these fixes.

### **Connecticut High Court Rejects “Compelled Self-Defamation” Theory**

Plaintiff claimed he felt “compelled” to tell prospective employers “over and over” about the former employer’s defamatory statements.

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

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

A job description does not control exempt status, rather it is what the employee actually does.

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

Performance issues raised for the first time after the employer was sued.

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

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

A good overview of a fiduciary’s responsibility generally.

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

Information on abusive tax shelter schemes and transactions involving employee retirement plans.

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

The fiscal year 2004 cap of 65,000 has been reached. Petitions for H-1B visas 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.

## **ON THE EMPLOYEE BENEFITS FRONT**

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

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**

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**

Issue was whether or not the retirement incentive plan had been under “serious consideration” at the time the plaintiffs retired.

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

“Preponderance of evidence” is the new standard, at least in the 10<sup>th</sup> Circuit.

## **ON THE LABOR FRONT**

### **Batter Up!**

Third Circuit affirms arbitration award ordering professional baseball to reinstate 9 of 22 umpires who previously had resigned in a labor dispute.

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

Someone dropped the ball here.

### **“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”).