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One Little Mistake . . .

The Seventh Circuit Court of Appeals, in [Young v. Verizon's Bell Atlantic Cash Balance Plan](#), Nos. 09-3872 & 09-3965 (7th Cir. 2010), recently issued a decision that saved Verizon Communications, Inc. (Verizon) \$1.67 billion in benefit costs due to a drafting error (scrivener's error) in its pension plan, according to the court. The opinion states "ERISA's rules for written plans are strictly enforced, but...not so strict as to prevent equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that is inconsistent with participants' expected benefits." This is notable because the IRS position with respect to scrivener's error is essentially that they do not exist. If a plan sponsor wanted to correct a scrivener's error it could attempt to do so via the IRS Voluntary Correction Program under the Employee Plans Compliance Resolution System (EPCRS). However, correction under EPCRS could be quite costly.

In *Young*, the scrivener's error arose as the plan sponsor transitioned its pension plan to a cash balance pension plan, under which the participants balances would be transformed from a defined annuity into a cash balance according to a formula specified in the plan document. In-house counsel took over the drafting process with the fourth of six drafts. In the fourth draft, in-house counsel revised the formula for transitioning the retirement benefits for each participant into a cash balance under the new plan, which accidentally resulted in the formula using a transition factor in the calculation twice, instead of once. This drafting error was not noticed in either the fifth or sixth drafts by the plan sponsor.

Verizon was able to seek relief under a counterclaim of equitable reformation pursuant to ERISA § 502(a)(3). The court stated equitable reformation is the kind of equitable relief authorized under § 502(a)(3). The relief sought effectively removed the second transition factor in the formula as a scrivener's error. In ruling in favor of Verizon the court limited the circumstances under which a favorable ruling could be had with respect to a scrivener's error. The court noted that equitable reformation of a plan was allowed where it is shown "by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits." The court realized this created "tension" with ERISA's written instrument or plan documents rule. However, the court believes this is mitigated by the "clear and convincing evidence" standard and the fact that the evidence must be "objective and not dependent on the credibility of testimony of an interested party." The court allowed introduction of extrinsic evidence regarding the intended meaning of the plan language, which "overwhelmingly" illustrated that the scrivener's error was not intended. The court relied on the drafting history of the plan document, the correspondence and communication between plan participants and the plan sponsor, and the course of dealing between the plan participants and the plan sponsor. Significantly, the court allowed the plan communication pieces regardless of the fact that they contained language stating the plan language would control in case of



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conflict. Finally, and most importantly however, none of the participants ever expected retirement benefits based on the language in the plan document.

For more information related to this article or pension plans in general, please contact [Tom Brous](#) or [Samuel Wilkerson](#).

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OSHA Issues New Whistleblower Regulations

On August 31, 2010, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published three interim final rules on new whistleblower procedures under the Occupational Safety and Health Act that are intended to provide additional protection to workers who voice safety, health and security concerns. The regulations, which establish procedures for handling worker retaliation complaints, allow filing by phone as well as in writing and filing in languages other than English.

A [statement](#) issued by Assistant Secretary of Labor for OSHA Dr. David Michaels stated, "When workers believe their employers are violating certain laws or government regulations, they have the right to file a complaint and should not fear retaliation. Silenced workers are not safe workers. Changes in the whistleblower provisions make good on the promise to stand by those workers who have the courage to come forward when they believe their employer is violating the law and cutting corners on a variety of safety, health and security concerns in the affected industries."

The regulations cover workers filing complaints in the [railroad, public transit, commercial motor carrier](#) and [consumer product](#) industries and are intended to create greater consistency among various OSHA complaint procedures. Public comments regarding the new regulations must be submitted by November 1, 2010.



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Supreme Court to Hear Several Cases Affecting Labor and Employment

In Stinson's [June 2010 Executive Briefing](#), we advised you of the U.S. Supreme Court cases (opinions, pending, heard or selected) affecting employers. Since reporting in June 2010, the Supreme Court has accepted five additional employment related cases for the Court's October 2010 session.

Anti-Retaliation: In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court will determine if an employee's oral complaint to an employer, rather than a written complaint, is protected under the anti-retaliation provision of the Fair Labor Standards Act (FLSA). The district court granted an employer's motion for summary judgment, holding that a complaint under the FLSA must be in writing for the employee to be protected from retaliatory discharge. The district court opinion was affirmed by the Seventh Circuit. When making its decision, the Supreme Court will consider decisions from other courts that have allowed FLSA protection for oral complaints.

ERISA: In *Cigna Corporation v. Amara*, the Supreme Court will determine the standard of proof necessary for a beneficiary of an ERISA plan to recover benefits where there is a discrepancy between the plan document and the Summary Plan Description (SPD). The Second Circuit applied a "likely harm" standard, which allows a beneficiary to recover if it can be shown that he or she was "likely harmed" by a deficient SPD. The SPD deficiency must be more than a "harmless error." This approach falls in between the more restrictive "reliance-or-prejudice" standard – endorsed by the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits – and the less restrictive "no-reliance-or-prejudice" standard – adopted by the Third, Fifth, and Sixth Circuits.

FICA Student Exception: The Supreme Court will decide whether medical residents are "students" of their medical colleges or "employees" of teaching hospitals in *Mayo Foundation for Medical Education and Research v. United States*. Medical schools argue stipends paid to residents fall under the "student exception" to the Federal Insurance Contributions Act (FICA), while the IRS contends residents are employees, not students, and therefore should be taxed. The Eighth Circuit held in favor of the IRS. The Second, Sixth, Seventh, and Eleventh Circuits have ruled in favor of the medical schools. The outcome of this case will not only significantly affect medical colleges, but medical residency programs across the nation.

Immigration: Arizona's Legal Arizona Workers Act (Act) allows Arizona superior courts to revoke business licenses of employers who knowingly or intentionally hire unauthorized aliens. Further, the Act makes participation in E-Verify mandatory for all employers. In *Chamber of Commerce of the United States v. Candelaria*, the Supreme Court will decide whether the Act is preempted by federal law. The Ninth Circuit held the Act was neither expressly or impliedly preempted by federal law. This decision will set precedent that will have an effect on numerous



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states. Of note, 12 states have passed similar laws. Many of these laws address the same issues the court will be faced with in *Candelaria*. The ruling will affect employers who do business in multiple states and have had to manage their way through particularized state laws that control the hiring of unauthorized workers.

Third-Party Retaliation: Federal law forbids employer retaliation against an employee because that employee engaged in “protected activity.” For example, an employee cannot be fired for filing an EEOC claim alleging unlawful discrimination. In *Thompson v. North American Stainless*, the Supreme Court will address whether federal law protects a third party from retaliation where they are closely associated with an employee engaging in protected activity. The Sixth Circuit held the employee could not bring a claim under federal law because there is not a recognized cause of action for third-party retaliation - if he or she was not engaged in the protected activity. This decision could have a great effect on employers because an expansion of the class of individuals protected under this federal law would likely dramatically increase the number of retaliation claims filed.

For additional information regarding this article, please contact [Kristi Griess](#) or [Kathie Haley](#).

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Inside Washington

New Laws, Regulations and Agency Guidance

EEOC . . .The EEOC Office of Legal Counsel Staff issued an informal opinion [letter](#) on July 28, 2010, regarding the use of Internal Revenue Service (IRS) Form 8850 for use in applying for the Federal Work Opportunity Tax Credit (WOTC) and whether the Form comports with the federal equal employment opportunity enforced by the EEOC, most specifically Title I of the Americans with Disabilities Act (ADA). The letter concludes the Form is authorized by the EEOC and does not violate the law even though it makes disability-related inquiries.

ERISA . . .The U.S. Department of Labor's Employee Benefits Security Administration [announced](#) on August 30, 2010, a [proposed regulation](#) to update the procedure for filing and processing applications for exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act (ERISA). The proposal would "consolidate the existing policies and guidance on the exemption process and would clarify the types of information and documentation required to submit a complete filing, expand the methods for transmitting filings to include electronic submissions, and make the exemptions more understandable for participants and other interested parties." Written comments regarding the proposed procedures are due on or before October 14, 2010.

HITECH . . .On July 28, 2010, the U.S. Department of Health and Human Services (HHS) [announced](#) a breach notification rule update concerning the Interim Final Rule for Breach Notification for Unsecured Protected Health Information, issued pursuant to the Health Information Technology for Economic and Clinical Health (HITECH) Act, that was published in the Federal Register on August 24, 2009, and became effective on September 23, 2009. As a result of various public comments received regarding the rule, HHS announced it is withdrawing the breach notification final rule from OMB review to allow for further consideration. The announcement indicated that this is a "complex issue and the Administration is committed to ensuring that individuals' health information is secured to the extent possible to avoid unauthorized uses and disclosures, and that individuals are appropriately notified when incidents do occur. We intend to publish a final rule in the Federal Register in the coming months. Until such time as a new final rule is issued, the Interim Final Rule that became effective on September 23, 2009, remains in effect."

NLRB . . .The new members of the National Labor Relations Board apparently did not take a summer vacation. In August alone, the Board issued more than 100 [decisions](#) with issues ranging from employee discipline to picketing to refusal to bargain. A summary of the decisions can be found in the NLRB's [Weekly Summary of Cases](#) for August.



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OSHA . . . On August 9, 2010, the Occupational Safety and Health Administration (OSHA) published its [new rule](#) regarding the use of cranes and derricks in construction. Employers have until November 8, 2010, to come into compliance with a majority of the provisions contained in the new rule, although certain provisions have delayed effective dates. In short, the new rule will require companies to make changes in current safety procedures for operating cranes and derricks.

For more information regarding these updates, please contact [Stephanie Scheck](#).