

Severance, ERISA, and Rum Punch

Article By:

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ERISA provisions are like fruity rum drinks. A little inattention and they can sneak up on you with most unpleasant consequences. No place is this more true than with severance pay. Many employers still believe that if they make just a single payment to a departing employee, they have not created a plan subject to the *Employee Retirement Income Security Act of 1974* (“ERISA”). Employers who meet this test trust that the severance payment can be classified as an ERISA-exempt payroll procedure, rather than as separate and ongoing administrative scheme, *i.e.*, an ERISA plan. The Supreme Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) took the view that simply writing a check hardly constitutes the operation of a benefit plan. Over the years, however, courts have chipped away at, polished, refined and in some cases disagreed as to the applicability of this decision.

A recent example is the 3rd Circuit district court case of ***Zgrablich v. Cardone Industries, Inc.*** In that case, an executive was promised severance benefits payable over more than two years with the level of benefits varying based upon whether the termination was for cause, without cause or based on factors such as death or disability. When the employer didn’t pay, the employee sued in state court and the employer removed the matter to federal court under the view that the severance agreement was governed by ERISA.

In finding that the severance agreement was an ERISA plan — and, accordingly, denying remand — the court cited these important factors:

First, the court found that from the surrounding facts one could determine the intended benefits, the beneficiaries, a source of financing and procedures for receiving benefits — all the factors necessary for an ERISA plan.

Second, the court looked for an administrative scheme — something more than just writing a check. A scheme was found in the provisions that provided severance benefits could vary based on the reason for termination. The court also found on-going administration in the fact that severance payments, including health and other benefits, could be terminated if there was a breach in the severance agreement’s non-compete and non-solicitation provisions. Also, health coverage continuation could be terminated if coverage was obtained from a new employer.

Third, the court rejected the argument that because the severance provisions were contained in an

individual agreement, they could not amount to a plan governed by ERISA.

Finally, the court found that ERISA applied because the dispute was over the right to payments — a claim that implicates coverage and benefits established under a plan — and not a contractual matter dealing with the mere computation or execution of the amount of such payments.

So, what is the take away from this case? If your severance benefit is more than two years' pay or if payments extend over more than two years, the plan likely is beyond the ERISA severance pay exception. If the plan involves more than one check which is easily calculated, don't look back. Get help. You likely have an administrative scheme and, accordingly, ERISA provisions — including plan document, reporting and disclosure requirements — could be sneaking up on you.

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