SEVERANCE ARRANGEMENT NOT SUBJECT TO ERISA WHERE NO NEED FOR AN ONGOING ADMINISTRATIVE PROGRAM

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In a recent case decided in the Western District of New York, a former executive sued his employer for not providing severance after he terminated his employment in connection with a change in control. The company had a severance arrangement in place specifically for the purpose of providing severance payments to certain employees terminated within two years of the company's change in control. As pertinent to this case, the arrangement provided for severance payments in the event an eligible employee terminated his employment for "Good Reason" within two years of the change in control. The former executive claimed he had "Good Reason" but the company disagreed, and litigation followed. At issue before the court was whether it had jurisdiction on the basis of the arrangement being a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

The court's analysis was guided by three non-exclusive factors used by courts in the Second Circuit and an extensive review of related case law. The first factor was whether administration of the arrangement required managerial discretion. On this factor, the court found that no discretion was required with respect to the amount, timing, or form of severance payments. While the arrangement required some analysis of the reasons for the employee's termination, the arrangement outlined specific criteria and required only a one-time determination, not an ongoing discretionary exercise. The second factor was whether a reasonable employee would view the arrangement as involving an ongoing commitment by the employer to provide benefits. On this factor, the court noted that the arrangement did not impose any ongoing responsibilities between a terminated employee and employer after termination other than severance payments. Additionally, the arrangement was available for only two years after a change in control, rather than an indefinite severance arrangement that would require regular severance determinations. The third factor was whether each employee's termination would have to be analyzed separately in light of specific criteria. The court found that this factor raised the closest question because some separate analysis was required, but found that the specific criteria delineated in the arrangement made any separate analysis minimal. Finally, the court also examined the arrangement for other "usual earmarks" of ERISA plans. While the arrangement was reduced to a plan document, it did not provide for a plan administrator, fiduciaries, an administrative review or claims procedure, employee contributions, or use of a trust. Moreover, the arrangement was made subject to Maryland law, with no mention of ERISA or other federal law. The court also noted that the arrangement was not a pension plan, as it did not relate in any way to retirement.

While this particular severance arrangement was found not to be an ERISA plan, the court stressed that analyzing whether such an arrangement is an ERISA plan requires a mostly fact-dependent analysis with no set checklist of factors to follow. The case highlights the fact that care should be taken in drafting a severance arrangement if the goal is to prevent it from being subject to ERISA plan requirements (e.g., ERISA fiduciary obligations, reporting requirements, etc.). *Hall v. LSREF4 Lighthouse Corp. Acquisitions, LLC (W.D.N.Y. 2016)*.