

Client Alert

Second Circuit Identifies Three-Part Test to Determine Whether Severance Plans Are Subject To ERISA

October 21, 2015 – In *Okun v. Montefiore*, the Second Circuit Court of Appeals identified a three-part test to determine whether an employer’s severance policy constitutes an “employee welfare benefit plan” under the Employee Retirement Income Security Act of 1974 (“ERISA”). Being subject to ERISA can result in more stringent regulatory requirements, as well as certain additional protections and benefits for employees. The *Okun* case is significant in that it establishes factors which employers can look to in analyzing whether they are sponsoring ERISA plans. We encourage employers to review their severance plans, whether formal or informal, to determine the extent to which ERISA’s protections are applicable.

In *Okun*, Montefiore’s severance policy essentially provided that all full-time physicians who were terminated without cause would be entitled to severance pay. Eligible physicians with more than fifteen years of service were also entitled to review of the amount of severance pay by Montefiore’s president. *Okun*, the plaintiff, was a long-time pediatrician and professor at Montefiore Medical Center’s Albert Einstein College of Medicine, who gave notice of his resignation. A few days later he was summarily dismissed for cause which would not have entitled him to severance benefits. *Okun* filed suit alleging that he should have been fired without cause and that his for-cause termination was a pretext for Montefiore’s interference with his right to payments under the policy and ERISA.

In its analysis, the Court looked to *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), in which the U.S. Supreme Court relied on the absence of an “ongoing administrative program” to conclude that the relevant payments did not constitute an ERISA “plan.” The Court of Appeals then looked to three non-exclusive factors to consider when determining whether an employer’s program involves such an ongoing administrative program. They are:

- Whether the employer’s undertaking or obligation requires managerial discretion in its administration;
- Whether a reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits; and

- Whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria.

In *Okun*, the Court ultimately concluded that the policy involved an ongoing administrative program and, therefore, constituted an ERISA plan. As a result, Okun is, at a minimum, entitled to the procedural protections afforded by ERISA.

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