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District Court Rules that Company Discretionary Offer of Voluntary Separation Agreements Does Not Create an ERISA-Covered Severance Plan

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It always has been difficult to give a consistent answer as to whether informal severance arrangements have created an ERISA-covered severance plan. In *Mance v. Quest Diagnostics Inc.*, 2017 WL 684711 (DC NJ 2017), the U.S. District Court held that Quest's decision to provide some departing employees with severance benefits under a voluntary separation agreement ("VSA") process was provided on such a discretionary basis that it did not establish a plan under ERISA.

By way of background, the U.S. Department of Labor and the courts uniformly have held since the 1980's that severance pay benefits are covered by ERISA if the severance benefits are provided pursuant to a "plan, fund or program." Under the test most commonly applied by the courts including the District Court here, a "plan, fund or program" will be established for purposes of ERISA if, from the surrounding circumstances, a reasonable person can ascertain (1) the intended benefits, (2) a class of beneficiaries, (3) the source of financing, and (4) procedures for receiving benefits. The courts have applied these factors to find that the existence of an ERISA plan can be established from written guidelines set forth in internal policy statements or corporate manuals or by descriptions in employee handbooks or from an employer's consistent past practice of awarding severance benefits to

involuntarily terminated employees.

But to make the determination more confusing, the Supreme Court has added the requirement that a plan, fund or program subject to ERISA will not exist unless it is necessary to establish an "administrative scheme" to provide the benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The court decisions understandably have not established a hard and fast rule regarding how much administration is too much.

Interestingly, the District Court found that Quest had established a separate administrative scheme to determine both eligibility for and the type of VSA benefits that might be offered to an employee. However, the District Court found that having an administrative scheme by itself did not establish an informal ERISA-covered severance plan. Applying the factors described above for determining whether a "plan, fund or program" existed, the Court found that a reasonable person could not determine the class of intended beneficiaries, the intended benefits or the process to request VSA benefits. Accordingly, Quest did not create an informal ERISA plan. (Note that the VSA benefits at issue were separate from the benefits provided by Quest under its ERISA-covered severance pay plan).

COMMENT: It is important to note that the application of ERISA to severance pay benefits is more favorable to employers than state law:

- An employer may design a severance plan under ERISA that specifically provides the employer with the discretion to make determinations that affect an employee's eligibility for benefits. Further, a deviation from a plan's written terms for particular individuals does not prohibit the employer from again applying the written terms to other individuals.
- A participant who sues for benefits is entitled only to the actual benefits – unlike state law, ERISA does not permit consequential or punitive damages or provide for tort remedies. (In egregious cases, a court may award attorney's fees.)
- ERISA does not provide for jury trials and claims for benefits may be removed to federal court.
- If a severance plan is properly drafted, company decisions will be reviewed by a court only to determine whether the decision is "arbitrary and capricious" (or an "abuse of discretion").