

Proskauer Benefits Brief: Severance Pay Plans & ERISA

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In this benefits law edition of The Proskauer Brief, senior counsel [Anthony Cacace](#) and partner [Robert Projansky](#) discuss how severance plans can be subject to ERISA. We will discuss the key advantages of having severance pay arrangements covered by ERISA and what employers can do to design plans that comply with the substantive and procedural requirements of ERISA, but also maximize the likelihood of benefiting from ERISA coverage. Whether a severance plan or arrangement is governed by ERISA is a rather fact-intensive analysis, so be sure to tune in for how those facts and circumstances can give rise to an ERISA plan.

Anthony Cacace: Hello. Welcome to the Proskauer Brief, Hot Topics in Benefits Law. I'm Anthony Cacace, here with Rob Projansky and today we're going to discuss severance pay arrangements and ERISA. So, Rob, when is the severance pay arrangement covered by ERISA?

Rob Projansky: Anthony, a lot of people focus on whether or not a document is in writing. So a written plan document that's operated in compliance with ERISA it's sometimes used as evidence that the arrangement's ERISA covered, but that's not really the defining criteria for whether or not something is covered by ERISA. If you look to ERISA what you'll see is that the definition of a plan is a plan, fund or program established or maintained by an employer for the purposes of providing severance to its employees. Distinguish that from a one-time arrangement where there is no ongoing administrative scheme. For example, I'm paying out a lump sum to everybody, just an exact amount to everybody, close the plant. Goodbye. That typically wouldn't be an ERISA plan but if you have some kind of plan or program that people can look at and say oh, yeah, there is an ongoing administration here, that's typically going to make it ERISA covered. Whether a severance plan or arrangement is governed by ERISA is actually a pretty fact intensive analysis with a lot of nuances and you pretty much have to talk to your lawyers about when those facts and circumstances give rise to an ERISA plan.

Anthony Cacace: So let's say the facts and circumstances are that an employer's severance pay arrangement is subject to an ongoing administrative scheme and covered by ERISA. What are some of the things that the employer needs to do to make sure it does not run afoul of ERISA?

Rob Projansky: We're going to talk in a few minutes about the benefits of ERISA and why ERISA coverage isn't such a bad thing, but to be sure, there are definitely burdens that are created by ERISA. So for example, if you have a severance plan arrangement that's governed by ERISA, you have to put it in writing. You also have certain reporting and disclosure rules both to participants in the form of summary plan descriptions and summaries of material modifications and things like that but also if you have more than 100 participants you have an obligation to report to the government on a Form 5500. You also have fiduciary obligations both to act in the best interests of plan participants, to act prudently, but also to follow the terms of that plan. That means there is a little bit less flexibility to determine the amount of benefits and the eligibility of those benefits. ERISA also has very specific procedures for how claims and appeals have to be administered when a participant thinks he or she didn't get the proper amount of benefits.

Anthony Cacace: But some of the things you just described actually can be beneficial to employers, right?

Rob Projansky: They absolutely could. Take for example, the requirement that you have a written plan document. That requirement actually encourages employers to reduce to writing the eligibility criteria, the exclusions, the benefit formulas. When you reduce them to writing you make it far less likely that you're going to face claims of oral promises or patterns of past behavior that give rise to some vested right in participants. It also encourages you as an employer to be a bit more consistent in your implementation, which avoids other employment problems. Another example of where something we call the burden can actually be a benefit is those claims and appeals procedures. Yes, an employer has to follow them and has to follow them close to the letter of the law. That's the bad news. The good news, Anthony, is that the participants have to follow them as well. What does that mean? Well, it means they have a set of prelitigation burdens that can serve to reduce the number of lawsuits that participants face. You have to have the right language in your plan document in order for those to be mandatory for a participant before they go to court but if you do have that language you're in much better shape.

Anthony Cacace: So, Rob, aside from the ones you just mentioned, are there any other advantages to having your severance pay arrangement covered by ERISA?

Rob Projansky: There are actually two key advantages. The first I would put in the category of advantages that arise from preemption. So ERISA has a provision, as we all know, that says that state law is preempted. What that means is that if a former employee wants to bring a claim for severance benefits, he or she has to do so under federal law and typically in federal court where the environment is far more favorable to an employer. In contrast, to many state law claims that might otherwise apply, under ERISA there is no punitive damages and attorneys' fees and court costs are only imposed at the discretion of the court. In addition, there are no jury trials in ERISA suits resulting in more reason and predictable outcomes, which is a good thing for employers. The second bucket of benefits is that fiduciaries under ERISA covered plans can generally reserve very broad discretion with respect to their determinations when it comes to benefit or plan interpretation. What I mean by that is that a review in court is not going to second guess these determinations as long as the fiduciary wasn't acting in an arbitrary or capricious manner. But, in order for a fiduciary to avail him or herself of that benefit, there has to be very specific plan language reserving that discretion to the plan fiduciary.

Anthony Cacace: So if the employer is considering instituting a severance pay arrangement, at what part of the process should they be contacting their counsel?

Rob Projansky: I think the best thing you can do is contact your counsel early to talk about two things. One is that there is there a reasonable chance that this thing is going to be ERISA covered in the first instance. Number two, what can I do if this thing is ERISA covered to draft my document in order to take advantage of all these benefits that ERISA coverage does provide? If I'm going to have the burdens I certainly want to take advantage of the good stuff.

Anthony Cacace: So, Rob, if you had to give the listeners one takeaway with respect to this topic, what would it be?

Rob Projansky: Many severance plans, whether they're voluntary, whether they're involuntary, whether they're written or whether they're unwritten, are going to be subject to ERISA. What employers need to do is to be sure that they're designing their plans not only to comply with the substantive and procedural requirements of ERISA where it applies but also to ensure that they're maximizing the likelihood that they're going to get the benefits of ERISA coverage.

Anthony Cacace: Thanks, Rob. Thank you all for joining us today on the Proskauer Brief. Stay tuned for more insights on the latest hot topics in benefits law and be sure to follow us on iTunes.

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