

# Fifth Circuit Rules that Project Completion Bonus is Not an ERISA Severance Plan

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Whether a one-time payment of benefits constitutes an employee benefit plan under ERISA has been the source of some consternation in the courts for many years. The Fifth Circuit, in *Atkins v. CB&I, LLC*, recently had occasion to consider the issue and held that a bonus conditioned on completing a project was not an ERISA severance plan. 2021 WL 1085807 (5th Cir. Mar. 22, 2021).

In *Atkins*, the employer's "Project Completion Incentive Plan" offered a bonus to employees who worked until completing their roles on a project. The bonus was styled as a "retention" bonus, but it was payable upon being laid off in a reduction-in-force or transfer to a different project site. The plaintiffs were five former employees who quit mid-project. They sued the employer in Louisiana state court alleging that the plan violated state wage law by denying bonuses to employees who quit prior to the project's completion. The employer removed the case to federal court on the ground that the plan was an ERISA-governed severance plan.

The district court treated the plan as a severance arrangement and held that ERISA applied because the plan's individualized eligibility determinations required an "ongoing administrative scheme" typical of ERISA plans. As a result, the district court concluded that the plan was governed by ERISA, which meant that ERISA preempted plaintiffs' state law claims and the case would be adjudicated in federal court.

On appeal, the Fifth Circuit vacated the district court's judgment and remanded the case to state court. In its view, the plan was not subject to ERISA for several reasons. First, the bonus was a single payment with a simple calculation: five percent of the employee's earnings for the project. Second, an individual's eligibility coincided with the end of a discrete project and there was little, if any, discretion involved. Finally, the employer lacked any special administrative procedures for handling claims and appeals, offering the plan on a large scale, or monitoring participants. As a result, the Court concluded that the plan lacked the "complexity and longevity" typical of ERISA plans and was thus outside its scope.

### **Proskauer's Perspective**

The question of whether a severance plan requires an ongoing administrative scheme sufficient to be subject to ERISA is fact-specific, and the case law is not consistent from one court to the next, which makes it difficult to predict whether particular arrangements will be subject to ERISA. This case caught our attention, because it appears that the plan could have been excluded from ERISA under 29 C.F.R. § 2510.3-2(c) by reason of being a bonus program that provided payments for work performed. Unlike a typical severance arrangement, the plan language described the benefit as a "retention incentive" and payment was tied to completing projects, without regard to whether employment actually terminated.

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