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ERIC

FocusOn Call
BENEFITS LITIGATION UPDATE

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Presented by

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Agenda

1. *Okun v. Montefiore*: Are Your Severance Policies Subject to ERISA?

2. Coming Attractions: Data Breach Litigation Targeting Employers

3. Will A Third Wave of Suits Over The Contraceptive Mandate Bring The Culture Wars To Corporate Employee Benefits?

4. Increased Litigation Risks for Fraudulent Concealment Fiduciary Breach Claims

Okun v. Montefiore: Are Your Severance Policies Subject to ERISA?

PRESENTED BY: GRETCHEN HARDERS

Okun v. Montefiore

Second Circuit found in *Okun MD v. Montefiore Medical Center*, 215 WL 4385294 (2nd Cir. 2015) that Montefiore's informal severance policy constituted an ERISA severance plan.

- Plaintiff physician was terminated for "cause"
- Since 1987, the hospital had a practice of providing severance and since 1996, it had maintained a severance policy document
- Physicians who were hired before a certain date and terminated without cause would be entitled to notice or severance pay
- The hospital's medical director was required to review the amount of severance for any physician with more than fifteen years of service.
- The policy provided that it may be changed, modified or discontinued at any time.

Okun v. Montefiore (continued)

Did the hospital's severance policy constitute an "ongoing administrative scheme"?

- The Second Circuit found the severance program represented a multi-decade commitment to provide severance
- There was sufficient managerial discretion because the hospital was required to determine whether the physician was terminated for cause and whether severance should be increased
- The Second Circuit rejected other factors, such as the mechanical and formulaic nature of policy, the right to terminate the policy at any time and the minor amount of discretion involved

ERISA Severance Plan Guidance

Is there an "ERISA plan"?

- *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987) sets forth the principal test for determining whether a severance plan is subject to ERISA, that is, to be an ERISA plan, a severance arrangement must require an:
  - » **"ongoing administrative scheme"**
- An ongoing administrative scheme does not include a limited program of terminations because it is not "ongoing"
- A severance arrangement that does not require managerial discretion is not an "administrative scheme"
- Where is the line for managerial discretion?

ERISA Severance Plan Guidance

Advantages of having an ERISA plan:

- Preemption of state law, including contract claims
- Federal court juridiction
- Claims review process that requires administrative remedies be exhausted
- Deferential arbitrary and capricious review
- No punitive damages
- Minimal ERISA compliance (only subject to ERISA disclosure and reporting)
- Written plan document requirement limits claims based on oral representations or ambiguous policies / estoppel
- Reservation of rights clause
- Establish welfare plan (not pension plan)

ERISA Severance Plan Guidance

Disadvantages of having an ERISA plan:

- Must communicate plan to all covered employees
- Right to attorney fees if plaintiff prevails
- ERISA reporting and disclosure requirements (summary plan description, Form 5500)
- Fiduciary obligations and possible claims of breach of fiduciary duties

What should plan sponsors do now?

Plan sponsors should review their outstanding severance programs, practices and policies

- Is the program or practice in writing?
- How long has the program been in place?
- How is the program communicated?
- How is eligibility for the program determined?
- Who decides on eligibility?
- Have there been complaints from employees or former employees about the severance program?
- How could disclosure to eligible employees be perceived?

Coming Attractions: Data Breach Litigation Targeting Employers

PRESENTED BY: ADAM C. SOLANDER

Data Breach Litigation

- In November 2014, Sony was the victim of a cyber-attack, possibly related to the production of a movie that parodied North Korean leader Kim Jong Un
- According to the complaint, the hackers stole PII of at least 15,000 current and former Sony employees and then posted this information online
  - The plaintiffs claimed Sony failed to implement and maintain adequate security measures to protect its employees' personally identifiable information ("PII"), and then improperly waited at least three weeks to notify plaintiffs
  - The settlement could cost Sony up to $8 million
- Takeaways:
  - Employers are now in the crosshairs
  - Risk assessment: employers must understand where sensitive HR data resides and what threats and vulnerabilities may exist to that data
  - Must train employees to be responsible stewards of data
  - Be prepared for when the worst happens

Will A Third Wave of Suits Over The Contraceptive Mandate Bring The Culture Wars To Corporate Employee Benefits?

PRESENTED BY: JOHN HOUSTON POPE

ACA - Mandates

- Contraceptive coverage
- Abortion

First Wave Suits

- Hobby Lobby (2014)

  Second wave suits

- Zubik v. Burwell
  (cert granted Nov. 6, 2015)

Third Wave

- Objection to paying for coverage
- Objection to coverage availability for family members

Wieland v. HHS (8th Cir. 2015)

- State Legislator, under state government plan
- Desire to opt out of contraceptive coverage
- Wanted to keep daughters from obtaining it

Howe v. Burwell (D. Vt. 2015)

- Exchange participant
- Anti-abortion
- Objected to collecting premium to cover abortion services

Potential Application to Private Employers

- State RFRA protections
- Title VII of Civil Right Act
- State anti-discrimination laws

Take Aways

- Know whether accommodations can be made and at what cost
- Monitor participant objections
- Effective communication

Increased Litigation Risks for Fraudulent Concealment Fiduciary Breach Claims

PRESENTED BY: JOHN HOUSTON POPE

Limitations Periods for Fiduciary Duty Claims (§ 413)

- Statute of Limitations – 3 years from discovery
- Statute of Repose – 6 years from act or omission
- Exception when fraud or concealment occurs

Defining Fraud or Concealment

- Active concealment of breach
- Nature of claim

Fulghum v. Embarg (10th Cir. 2015)

- Joins 2d Circuit to use “nature of claim” rule
- Divider federal appellate courts – five other circuits use “active concealment of breach” rule

Take Aways

- Issue ripe for US Supreme Court – petition pending (ERIC is amicus)
- Concern over expansion of scope of liability for certain types of claims

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