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LABOR & EMPLOYMENT OBSERVER

NEWS ON CONTEMPORARY ISSUES

FALL 2005

ARE PENNSYLVANIA AND NEW JERSEY EMPLOYERS SAFE WHEN IT COMES TO DISCLOSING INFORMATION ABOUT A CURRENT OR FORMER EMPLOYEE'S JOB PERFORMANCE?

The Pennsylvania legislature recently granted employers qualified immunity from civil liability for discussions about a current or former employee's job performance. The new Pennsylvania statute (codified at Title 42 of the Pennsylvania Code under Section 8340.1) explicitly states that an employer's disclosures to a prospective employer are presumed to be made in good faith. Accordingly, this new statute broadly protects human resources personnel and other employer representatives when such individuals respond in good faith to inquiries from a prospective employer about a former employee's job performance. An employer's ability to discuss a former employee's job performance, however, is not absolute. The good faith presumption can be rebutted by "clear and convincing evidence" that an employer disclosed information that: (1) the employer knew was false or in the exercise of due diligence should have known was false; (2) the employer knew was materially misleading; (3) was false and rendered with reckless disregard as to the truth or falsity of the information; or (4) was information the disclosure of which is prohibited by any contract, civil, common law or statutory right of the current or former employee.

On the heels of the Pennsylvania statute's enactment, the New Jersey Superior Court has acknowledged that New Jersey employers can be liable for the negligent misrepresentation of a former employee's work history. In *Singer v. Beach Trading Co., Inc.*, 379 N.J. Super. 63 (App. Div. 2005), the court held that an employer can be held liable if: (1) the inquiring party clearly identifies the nature of the inquiry; (2) the employer voluntarily decides to respond to the inquiry, and thereafter unreasonably provides false or inaccurate information; (3) the person providing the inaccurate information is acting within the scope of his/her employment; (4) the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the plaintiff; and (5) the plaintiff suffers quantifiable damages proximately caused by the negligent misrepresentation.

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Similar to the good faith limitations under the new Pennsylvania statute, the court in *Singer* clarified when an employer can be held liable for the negligent misrepresentation of a former employee's work history under New Jersey law. The plaintiff in *Singer* left her employer, Beach Trading Co., to start a new job at HRK Industries. Soon after joining HRK, the plaintiff's manager began to question the veracity of the plaintiff's representations on her resume concerning her job title at Beach Trading Co. To verify the plaintiff's representations, the manager made several calls to Beach Trading Co. and was told on more than one occasion that the plaintiff was neither a supervisor nor vice-president, as the plaintiff claimed on her resume. After speaking with representatives from Beach Trading Co. the HRK supervisor fired the plaintiff. The plaintiff subsequently asserted a claim for negligent misrepresentation against Beach Trading Co. because she in fact had held the titles claimed on her resume.

The *Singer* court ruled that the plaintiff was entitled to assert a cause of action for negligent misrepresentation because she fell within the class of individuals injured by the misrepresentation about her employment at Beach Trading Co. The court explained that a "negligent misrepresentation" constitutes an incorrect statement, negligently made and justifiably relied on by the recipient of the information. Such a claim may be the basis for recovery of damages for economic loss sustained as a consequence of that reliance. The court ultimately concluded that the plaintiff's negligent misrepresentation claim should survive summary judgment because genuine issues of fact remained as to whether the Beach Trading Co. employees were acting within the scope of their employment when responding to the inquiries from HRK and whether HRK breached its duty concerning the representations about the plaintiff's job titles.

After *Singer*, New Jersey employers must now be extremely cautious when disclosing information about their current or former employees. Moreover, while Pennsylvania employers are the beneficiaries of new statutory protection, *Singer* reminds us all of the possible ramifications an employer may face for failing to respond to an inquiry about a former employee in good faith.

Please contact Charles J. Kawas, Esquire, for further information and assistance at ckawas@cozen.com or (215) 665-2735.

PROMOTED EMPLOYEE'S LACK OF QUALIFICATIONS

NOT A DEFENSE TO DISCRIMINATION SUIT

Employers who hire or promote employees without the requisite job qualifications should take notice. In a recent case decided by the U.S. Court of Appeals for the Third Circuit, these employers will not be able to defend against employment discrimination cases on the basis that the complaining employee was unqualified.

In the case of *Hugh v. Butler County Family YMCA,* 418 F.3d 265 (3d Cir. 2005), Cherie Hugh (Hugh) filed a gender-based employment discrimination suit against her former employer, the Butler County Family YMCA (YMCA). Hugh began her employment at YMCA as a

To suggest topics or for questions, please contact Jeffrey I. Pasek, Esq., Chair of Cozen O'Connor's Labor & Employment Department. Jeff can be reached at 215-665-2072 or 800-523-2900 or at jpasek@cozen.com. To obtain additional copies, permission to reprint articles, or to change mailing information, please contact Lori Scheetz 800-523-2900, or at lscheetz@cozen.com.

part-time volunteer recruiter and subsequently became a full-time volunteer coordinator. She then was promoted to the position of director of Big Brothers, Big Sisters. Shortly thereafter, Hugh was terminated for poor performance on the basis of lacking leadership skills. Hugh was not informed that she was being terminated due to lack of qualifications for the position.

The position of director of Big Brothers, Big Sisters required that the applicant possess a college degree in social work and experience as a caseworker. The YMCA knew that Hugh did not meet either of these requirements. At no time did Hugh conceal or misrepresent her requirements for the job. In fact, the evidence demonstrated that Hugh was promoted on the basis of her past performance. A male was hired to fill Hugh's position at a higher salary. Hugh subsequently instituted suit against the YMCA.

In response to the lawsuit, the YMCA filed a Motion for Summary Judgment on the basis that Hugh was unable to establish a *prima facie* case of discrimination because she did not have the requisite qualifications. The district court granted the motion, but on appeal the Third Circuit disagreed, reversed the grant of summary judgment to the YMCA and remanded the matter for further proceedings.

In setting forth the standards which the plaintiff must meet in order to establish a *prima facie* case, the Third Circuit reiterated the *McDonnell-Douglas* burden shifting standard. The YMCA posited that Hugh could not institute this lawsuit because she never possessed the objective qualifications for the position in the first place, and therefore could never make out a *prima facie* case. In disagreeing, the Third Circuit stated that "satisfactory performance of duties, leading to a promotion, does establish a plaintiff's qualification for a job." *Id*. The court supported the proposition that where someone who is hired without the requisite qualifications does not adequately perform his or job, then the employer may terminate on that basis. However, in this case, the court found that "an employer cannot choose to promote an employee despite a known lack of qualifications and then rely on the lack of those qualifications as a reason for termination. Rather, the YMCA must show reasons for terminating Hugh based on her performance in the position." Further, the court found that the reasons for Hugh's termination -- canceling a meeting, being inappropriately attired for a meeting and failing to order a new sign -- were never the subject of disciplinary action or counseling by the YMCA. Accordingly, the court found that issues of fact remained which should be decided by a jury.

It is clear that the court sent a message to employers that they cannot have it both ways. If employers hire candidates or promote employees who are under-qualified or do not meet objective qualifications, then employers will not be able to use the lack of qualifications as a defense to a discrimination case. If employers decide to hire or promote employees without the objective qualifications, then employers must follow their own policies and procedures in meting out discipline when warranted. This decision leaves the door open for employers to terminate "unqualified employees" who fail to perform if there is documentation of poor performance and/or disciplinary action taken regarding the non-qualified employee. However, courts generally will look askance at employers who fail to follow their own policies in hiring or promoting qualified candidates while using the lack of qualifications as a defense in a discrimination case. The court squarely raised the possibility that termination under these circumstances could be "pretextual."

As always, it behooves employers to follow their own policies and procedures regarding hiring qualified candidates, as well as counseling or giving disciplinary warnings when required. Documentation of failure to perform will lend credence to a legitimate termination and

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support an employer's decision to terminate for lack of performance.

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EEOC ISSUES Q&A ON CANCER IN THE WORKPLACE

On July 27, 2005, the Equal Employment Opportunity Commission (EEOC) issued a set of questions and answers about cancer in the workplace and the Americans with Disabilities Act (ADA). The Q&A does not contain much in the way of new information, but rather gives examples which help to illustrate the position the EEOC will take on issues regarding cancer as a disability.

The EEOC has addressed five major areas:

(1) Whether and when cancer is a disability under the ADA;

(2) Questions to job applicants who may have cancer;

(3) Questions to an employee who has cancer;

(4) An employer's obligation to keep medical information regarding an employee's cancer confidential;

(5) An employer's obligations to accommodate employees with cancer; and

(6) Whether and when an employee's cancer may be considered a "direct threat" which prevents an employee from performing his or her job.

CANCER AS A DISABILITY

The EEOC re-articulates that cancer is a disability under the ADA when the cancer or its side effects substantially limit one or more of a person's major life activities. Thus, in the example given, an individual with breast cancer who is ill and exhausted from her treatment, such that she cannot care for herself and do regular activities like cooking, shopping or household chores, has a disability because her cancer substantially limits her ability to care for herself. Likewise, an individual with advanced testicular cancer who has had chemotherapy rendering him sterile has a disability because he is substantially limited in the major life activity of reproduction.

An individual with cancer also is considered disabled under the ADA if he or she has a record of a disability, such as an individual who was previously undergoing treatment for cancer and during that period of treatment was unable to care for her or himself for an extended period of time. An individual who is regarded as having an impairment, such as an individual who has a facial scar from surgery to treat skin cancer, and who therefore may be regarded by an employer as being substantially limited in a major life activity, is also considered disabled under the ADA. The "take-home" rule is that it will be very difficult to find a situation in which an individual with cancer is not considered to be disabled by the EEOC.

JOB APPLICANTS - OBTAINING MEDICAL INFORMATION

An employer may not ask questions about an applicant's medical condition, such as whether or not the applicant has or ever has had cancer, whether or not the applicant is undergoing chemotherapy or other cancer treatment or has done so in the past, whether the individual has taken leave for surgery or medical treatment, or how much leave the person has taken. However, if an applicant appears to be sick or tired, the employer may ask the applicant how he

or she is feeling. The employer also may ask questions pertaining to the performance of the job, such as whether the applicant can lift a certain amount of weight, whether the applicant can travel out of town, or whether the applicant can work rotating shifts, assuming that each of these functions is a requirement of the job.

The ADA does not require applicants to disclose disabilities during the application process unless the applicant needs reasonable accommodations specifically for the application process. Thus, an individual with cancer may ask for an accommodation after becoming an employee, even if he or she did not let the employer know that an accommodation would be needed during the application process.

If an applicant voluntarily discloses during the application process that he or she has cancer, the employer may ask follow-up questions regarding whether an accommodation will be required to perform the job, and if so, what type of accommodation. However, the employer may not ask questions about the employee's cancer, its treatment or its prognosis. If an employer learns that an applicant has or had cancer after the applicant has been offered a job, the employer may not use that fact to withdraw the job offer.

QUESTIONS ABOUT AN EMPLOYEE'S CANCER

An employer may ask questions about an employee's cancer, or request a medical examination of the employee, only if the employer has a legitimate reason to believe that the employee's cancer or other medical condition is affecting the employee's ability to do the job or to do the job safely. If an employer knows that the employee has cancer, and reasonably believes that the cancer, its treatment or its side affects may be causing an employee to have performance problems, the employer may ask the employee to undergo a medical examination to assist in determining what a reasonable accommodation may be, or may simply ask the employee whether a reasonable accommodation is needed. However, the simple fact that an employee has had cancer in the past is not enough to justify asking an employee who develops performance problems questions about his or her medical condition, including questions about whether the cancer has returned, unless there is some evidence that the performance problems are caused by the cancer.

If an employee has been on a leave of absence because of cancer, an employer may ask that employee to provide medical documentation regarding his or her ability to return to work, or may require the employee to have a medical examination before returning to work. Furthermore, the EEOC does note that an employer may call any employee on an extended leave in order to check on his or her progress or to express concern for the employee's health.

An employer also may ask an employee with cancer (1) for information, along with reasonable documentation, explaining the need for a reasonable accommodation; (2) for medical information as part of a voluntary wellness program; (3) for medical documentation justifying the use of sick leave, such as a doctor's note or other explanation, as long as all employees who use sick leave are required to provide the same information, and as long as the information requested does not exceed what is necessary to verify that sick leave is being used appropriately; and (4) for periodic updates on the employee's condition if the employee is on leave and has not provided an exact or specific date of return, or if the employee is requesting leave in excess of that which the employer has already granted.

KEEPING MEDICAL INFORMATION CONFIDENTIAL

Medical information regarding an employee's cancer (or other medical condition) must be kept confidential. Thus,

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an employer is permitted to disclose information about an employee's cancer (1) to managers and supervisors if doing so is necessary to provide a reasonable accommodation or to meet an employee's work restrictions; (2) to first aid and safety personnel if the employee would need emergency treatment or require some other assistance at work; (3) to individuals investigating compliance with the ADA, and similar state local laws; and (4) as needed for workers' compensation or other insurance purposes.

However, an employer may not tell other employees that their co-worker has cancer, even if the employer's purported reason for doing so is to explain why an employee is receiving a reasonable accommodation that appears to be "special treatment" on the job. The EEOC suggests that "rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining the privacy of all employees and emphasize that its policy is to refrain from discussing the work situation of any employee with co-workers." The EEOC suggests that employers may be able to avoid many such questions by training all employees on the requirements of all of the EEO laws, including the ADA.

ACCOMMODATING EMPLOYEES WITH CANCER

The EEOC suggests that the following types of reasonable accommodations may be required:

- Leave for doctor's appointments or to seek or recuperate from treatment;
- Periodic breaks or a private area to rest or take medication;
- Adjustments to a work schedule;
- Permission to work at home;
- Modification of office temperature;
- Permission to use the work telephone to call doctors;
- Reallocation or redistribution of marginal tasks to another employee; and
- Reassignment to another job.

The EEOC emphasizes that there are no "magic words" that a person must use when requesting a reasonable accommodation. Thus, an employee need not say that he or she has a disability, and need not ask for an accommodation in those words. It is enough that the employee tells the employer that he or she is having difficulty at work because of a medical condition, or that the employer notices that this is happening. Once the employer receives this information, the need to consider a reasonable accommodation is triggered. A request for an accommodation also can come (likewise without any "magic words") from a family member, friend, health professional or other representative of an employee.

If the employee's disability or need for a reasonable accommodation is not obvious, an employer may request reasonable documentation to establish the fact of the disability or the need for a reasonable accommodation. Because cancer is often an ongoing condition, the EEOC emphasizes that it may be necessary to provide an employee who has cancer with more than one reasonable accommodation as the employee's treatment progresses. For example, a single employee may require leave for treatment, and then may need to return to a part-time or modified schedule, or may need some other reasonable accommodation on the job.

An employer may not deny leave to an employee with cancer simply because the employee is unable to provide an exact date of return. The EEOC suggests that if the employee's date of return is unknown, the employee

should stay in regular communication with the employer to inform the employer of progress and to discuss the need for continued leave beyond what was originally granted. The EEOC suggests that upon receiving periodic updates from the employee, the employer may re-evaluate whether continued leave is an undue hardship.

THE DIRECT THREAT ISSUE

The EEOC's Q&A has nothing new on the issue of what constitutes a "direct threat" from an individual who has cancer. In the case of cancer, the perceived "direct threat" might be to the individual, him or herself, such as fear that the employee with cancer may have some sort of issue or problem in the workplace which worsens the employee's own health. The EEOC emphasizes that the employer's concern in this regard must be based on objective factual evidence, including the best recent medical evidence and advances to treat and cure cancer. The employer cannot operate on myths about cancer.

While this Q&A does not contain much new information, it does give employers some guidance on how the EEOC is likely to approach issues related to cancer under the ADA.

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THE PITFALLS OF SEVERANCE POLICIES AND PRACTICES

An employer will often provide severance benefits to a terminated employee for purposes of demonstrating corporate good will, and hopefully avoiding a potential future lawsuit. In exchange, an employer will ordinarily obtain a signed release from the employee pursuant to which the employee waives all claims against the employer. Often times, an employer will not have a formal, written severance policy, but will provide severance benefits at its discretion.

An employer is not obligated to provide any severance benefits. However, a decision to maintain a severance policy or practice, whether written or unwritten, and whether formal or informal, carries a risk that a disgruntled employee could claim that the policy or practice is administered unfairly or violates a particular law.

VIOLATIONS OF AGE DISCRIMINATION LAWS

An employer will not be able to enforce a release and waiver of age discrimination claims that were obtained in exchange for severance benefits if the employer does not provide benefits to the employee to which the employee would not have otherwise been entitled. The Older Workers Benefit Protection Act (OWBPA) was added to the federal Age Discrimination in Employment Act (ADEA) in 1990 to provide minimum procedural and substantive requirements for releases of claims under the ADEA. Substantively, the OWBPA provides, among other things, that a release must state that the employee waives rights only in exchange for consideration ***in addition to that which the employee is already entitled***. Thus, an employee who is 40 years of age or older cannot be asked to waive any rights under the ADEA or OWBPA in exchange for severance benefits that the employee was already entitled to under the employer's existing severance policy or practice.

There are a couple of potential concerns that arise when an employer seeks to provide severance to a terminated employee in exchange for a waiver of rights under age discrimination laws. The first concern involves the nature of the consideration given in exchange for the waiver or release. For example, in *Pierce v. Atchison Topeka and Santa Fe Railway Co.*, 110 F.3d 431 (7th Cir. 1997), Plaintiff filed an age discrimination charge with the

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EEOC after he was first demoted from his original position, and subsequently terminated. Plaintiff learned about a new severance package being offered to terminated employees and approached one of his supervisors to inquire about his rights. Plaintiff's supervisor offered Plaintiff the severance package in exchange for signing a general release of all claims against the company, including claims under the ADEA. Plaintiff executed the general release, yet also received a right-to-sue letter from the EEOC.

After filing a federal lawsuit, the court denied the company's summary judgment motion on the ground that the Plaintiff did not execute the release "knowingly and voluntarily." Specifically, the court relied upon evidence that, among other things, the severance package given to Plaintiff was similar to the buy-out package to which other terminated employees were entitled as a matter of policy, and thus it was not clear that the package was specifically given as extra consideration for a waiver of Plaintiff's statutory rights under the ADEA.

On the other hand, in *Sheridan v. McGraw-Hill Co., Inc.* 129 F. Supp.2d 633 (S.D.N.Y. 2001), the court found that a terminated employee did execute a general release knowingly and voluntarily because the employer offered the employee an enhanced severance package. In *Sheridan*, the Plaintiff was one of several employees who were being laid off as a result of a reorganization in one of the company's divisions. Terminated employees were given a letter that detailed the termination benefits they would receive, including a severance payment in the amount of $25,000. However, after several discussions between Plaintiff and the company's human resources director, the company offered Plaintiff an additional severance payment in the amount of $22,000 in exchange for a waiver by Plaintiff of all claims against the company. The court dismissed a subsequent lawsuit brought by Plaintiff on the ground that Plaintiff's waiver was knowing and voluntary. Therefore, a waiver and release of claims under the age discrimination laws will only be enforced if it is obtained in exchange for "extra" consideration.

A second area of concern under the ADEA arises when an employer seeks to deduct certain amounts received by an employee, such as pension benefits, from the employee's severance pay. Specifically, Section 623(l)(2)(A) of the ADEA prohibits an employer from deducting the amount of an employee's pension benefits from that employee's severance pay. However, an employer may deduct certain "added value" items related to pension benefits from the employee's severance pay, as long as the severance pay was made available in the first instance as a result of a contingent event unrelated to age. Thus, for example, an employer cannot reduce an employee's severance benefits simply because that employee is eligible to receive retirement benefits, unless the employer follows strict offset guidelines. *See*, *e.g.*, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) (employer's severance pay policy purposefully disqualified older employees from receiving severance because they were eligible for retirement). Furthermore, an employer also may not provide older workers with less benefits unless it can demonstrate that the cost of providing an equal benefit to an older worker is greater than the cost of providing the same benefit to a younger worker.

Employers should review their severance policies to make sure that the consideration given to an employee in exchange for signing an ADEA release constitutes "new" consideration to which the employee was not already entitled under company policy (*e.g.*, where the employee is already entitled to a specified amount of money based upon the employee's length of service with the company). An employer also should make sure any deductions comport with the strict requirements of the ADEA.

CLAIMS OF DISCRIMINATION GENERALLY

Even employers who do not have formal, written severance policies must still be cognizant of how any severance pay practice is applied. Federal and state civil rights statutes proscribe discrimination in the terms, conditions and benefits of employment based on an employee's protected group status. The practice of providing severance pay to employees clearly constitutes a benefit of employment.

As the U.S. Court of Appeals, Second Circuit held in *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001): "[P]roviding substantially different severance packages to employees who are alike in all material aspects except for their race and sex [or age] can support an inference of discrimination." Therefore, it is not only important for employers to determine whether to have any formal severance policy; any informal practice of giving severance to some employees but not to others should be scrutinized to determine whether decisions are being made based on an employee's protected group status.

CLAIMS UNDER ERISA

The Employee Retirement Income Security Act (ERISA) is a federal regulatory scheme that applies to most types of employee benefit plans, including certain severance plans. *See*, *e.g.*, *Cassidy v. Akzo Nobel Salt, Inc.*, 308 F.3d 613 (6th Cir. 2002) (severance plans are included within ERISA's definition of "employee welfare benefit plans). While ERISA does not require an employer to establish any particular plan in the first instance, once an employer decides to have a plan, it may have to establish, maintain and administer that plan consistent with ERISA's requirements. Put another way, even if an employer did not intend to create a severance plan that is covered by ERISA, a court's determination that the plan is in fact an "ERISA plan" subjects the employer to the various reporting, disclosure and fiduciary obligations contained in ERISA.

It is important to dispel the common employer notion that a severance policy will only be considered a covered ERISA plan if the severance policy is written. Indeed, a court will determine whether a severance policy constitutes an ERISA plan without regard to whether the policy is written or unwritten. In 1996, the Second Circuit Court of Appeals identified the following factors to be used in determining whether a severance pay arrangement constitutes a "plan" under ERISA: "Whether the employer's undertaking of the 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." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996).

Courts have considered these factors on a case-by-case basis. For example, the court in *Patterson v. J.P. Morgan Chase & Co.*, 2002 WL 207123 (S.D.N.Y.) held that an employer's severance policy was a covered "plan" under ERISA because individual assessments must be made with respect to each participant's termination, managerial discretion is necessary in administering the payments and employees could reasonably anticipate that payments and subsequent benefits would be an ongoing commitment on the employer's part.

Other courts have found that severance policies do not constitute "ERISA plans" under the circumstances of the particular case. *See*, *e.g.*, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 12 (1987) (policy of providing a one-time severance payment to employees did not create an ERISA employee benefit plan because the obligation did not create a "need for an ongoing administrative program

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for processing claims and paying benefits); *Baldo v. Zippo Manufac. Co.*, 48 Fed. Appx. 10 (2d Cir. 2002) (severance pay to the employee resulted from post-termination negotiations, rather than a predetermined "plan" providing "procedures for receiving benefits); *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463, 467 (2d Cir. 1993) (offer to pay 60 days of additional salary after closing of office did not create an ERISA plan because the "nature of the payments did not require an ongoing administrative employer program to effectuate them). Therefore, whether or not an employer intends to create an ERISA plan, it is crucial for an employer to determine whether its severance policy or practice would constitute a covered "plan" under ERISA, and, if so, whether it has complied with the vast procedural, substantive and administrative requirements contained in ERISA.

Please contact Michael C. Schmidt, Esquire for further information and assistance at mschmidt@cozen.com or (212) 453-3937.

LABOR & EMPLOYMENT ATTORNEYS "IN THE SPOTLIGHT"

Jay A. Dorsch (Philadelphia) was recently inducted as a fellow of The American College of Employee Benefits Counsel (ACEBC). Only 20 employee benefits attorneys throughout the country were selected for induction to the ACEBC which is a national distinction. The 20 inductees join 267 current fellows in the organization. To be selected as a fellow, each nominee is required to have engaged in employee benefits law for at least 20 years and have demonstrated a sustained commitment to the development and pursuit of public awareness and understanding of benefits laws through such activities as writing, speaking, public policy analysis, public education or public service. Nominees are also required to have provided exceptionally high quality professional services to clients, the bar and the public. Jay is chair of the Employee Benefits and Executive Compensation practice group and regularly represents Fortune 500 clients and tax-exempt entitites in all aspects of employee benefits and executive compensation matters, and related fiduciary and tax concerns.

Michael C. Schmidt (NY Midtown) recently presented at the **Problem Employees & The Law Seminar** in Melville, N.Y., on June 28, 2005. Michael's presentation, "An Ounce of Prevention: Prepare for the Worst," focused on employment at will, the covenant of good faith and fair dealing doctrine, implied contracts, anti-discrimination compliance, maintaining employee files, and how to avoid wrongful discharge claims, as part of the full-day event addressing a wide spectrum of employee issues. Michael concentrates his practice in commercial litigation and labor and employment law, focusing on large and small business issues pertaining to employer-employee relations, employment handbooks and policies, compliance with federal and state laws and litigation of employment discrimination and sexual harassment disputes.

Jeffrey L. Braff, **Sarah A. Kelly** and **Jeffrey I. Pasek** (Philadelphia) were recently named to the list of 2005 Pennsylvania Super Lawyers. The list is based on surveys of more than 36,000 lawyers across the state and represents the top 5 percent of Pennsylvania attorneys in more than 60 practice areas. The list of Pennsylvania Super Lawyers is published annually in the June issues of *Philadelphia* magazine and *Pennsylvania Super Lawyer*.

YOUR TURN

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