COMPLIANCE July 12, 2023

Twitter Hit With $500M Suit for Unpaid Severance

The proposed class action alleges Elon Musk promised to abide by the firm's severance plan but did not follow through.

By *Alex Ortolani*

Twitter was hit Wednesday by a complaint seeking $500 million in damages for allegedly not making promised severance payments to terminated employees, according to a court filing in U.S. District Court for the District of Northern California.

The complaint, brought by the firm's former head of people experience on behalf of a putative class of fellow former employees, alleges that Elon Musk and X Corp., the parent company of Twitter, violated the Employee Retirement Income Security Act by not delivering on severance payments promised in an employee benefit plan.

The complaint alleges that Twitter's benefit plan entitled many senior employees to severance of six months' base play, plus one week's pay for each full year of service, and employees with less time at the company to two months' base pay, plus one week's pay for each full year of service. The suit alleges that Musk and his leadership team told employees the benefit plan remained in place, then instituted mass layoffs in which employees were offered "at most three months of compensation."

"Musk initially [upon buying Twitter] represented to employees that under his leadership Twitter would continue to abide by the severance plan," Kate Mueting, the firm administrative partner in Sanford Heisler Sharp LLP, said in a statement. "He apparently made these promises knowing that they were necessary to prevent mass resignations that would have threatened the viability of the merger and the vitality of Twitter itself."

The complaint, *McMillian v. X Corp. et al.*, was filed by Sanford Heisler Sharp on behalf of Twitter's former human resources executive, Courtney McMillian, and the class of participants and beneficiaries in Twitter's severance plan.

According to the complaint, Musk and X Corp. are the fiduciaries on the plan, as ERISA law considers the employer the plan administrator in the "absence" of a designated fiduciary. The suit also claims Musk's communication to employees about the plan and severance payments makes them responsible under ERISA.

"These violations of fiduciary duties caused substantial harm to the Plan and its participants, by causing the Plan to be deprived of the funds necessary to make full payments to Plan participants," the complaint states.

Twitter did not immediately respond to request for comment on the complaint.

Andrew Oringer, general counsel and partner in the Wagner Law Group, which is not involved with the case, says employee seeking allegedly promised severance benefits may face multiple questions about the binding nature of the payouts. He notes that provisions possibly may provide the employer the ability to change the plan or "interpret the words of the plan and related documentation."

"Where there's reliance on a transaction document (like the Merger Agreement here), there will also be questions about whether anyone other than the parties to the transaction can enforce the provisions of the transaction document," Oringer notes. "And where oral assurances are alleged, it may be hard to enforce alleged oral promises."

Musk bought Twitter in October 2022 in a $44 billion deal, after which he took over the company as CEO, dubbing himself "Chief Twit," and laid off more than half the workforce, in part to cut costs.

The complaint cites Musk's own Twitter account as evidence, alleging that he wrote on November 4, 2022, that terminated staffers were getting "50% more than legally required," with "legally" referring to Department of Labor guidelines around worker layoffs, not to the plan in question. According to the complaint, "some laid-off employees have yet to receive anything," and the three months' severance others received is "a fraction of what employees are entitled to as plan participants."

The complaint goes on to allege that the defendants attempted to "hide the existence" of the severance plan from employees and refused to make payments "so those funds could be used to prop up the company," according to the complaint and a statement from Sanford Heisler Sharp.

Oringer notes that there could be hurdles regarding class certification in the case, particularly if "there is perceived to be a wide range of relevant factual scenarios. An inability to get class certification could easily be as damaging to the case's prospects as any substantive hurdle faced by a plaintiff."

Twitter, however, could also face challenges, Oringer says.

"For example, there are cases indicating that a fiduciary's dissemination of inaccurate information, and particularly intentionally inaccurate information as is alleged here, could amount to an actionable fiduciary breach," he says. "Such a claim requires the establishment of fiduciary status and would be bolstered by successfully establishing intentionality."

Tagged: DoL, Elon Musk, employee benefits, ERISA, litigation, twitter, X Corp