Professional Perspective

Using Mandatory Arbitration to Avoid ERISA Class Actions (Part 3 of 3)

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Parts 1 and 2 of this series discussed the statutory basis and legal decisions affecting whether ERISA fiduciary breach claims may be made subject to mandatory individual arbitration. Part 3 addresses the practical considerations that should be weighed by plan sponsors considering implementing mandatory arbitration and the outlook for future clarification of the law.

To Arbitrate or Not?

Arbitration is usually considered to be faster and less expensive than litigation. However, there is discovery in arbitration proceedings and it can be more lengthy and involved than plan sponsors expect. Further, though many arbitrators are now former federal judges, some arbitrators may not be very familiar with ERISA fiduciary issues. For example, ERISA is not one of the primary specialty areas listed on the AAA or JAMs websites, as it is folded under Employment Law. Even an arbitrator experienced in dealing with some employee benefit plan issues, such as disability claims or withdrawal liability issues, may lack the specific expertise to evaluate ERISA fiduciary issues. Further, there is no appeal as of right from the arbitrator's decision and appeals are generally limited to extraordinary circumstances such as fraud. While the parties could voluntarily agree to an appeal process in which each has the right to appeal, for many plan sponsors that may defeat the purpose of seeking arbitration to begin with, which is get a fast final resolution of the issues.

If arbitration is to be enforced along with a class action waiver, the expectation is that this will make 401(k) fee and investment litigation more time consuming and less rewarding for plaintiffs' counsel to pursue. In fact, Jerry Schlichter, whose firm has been representing participants in many of these cases, commented on the effect of individual arbitration as follows:

"The goal of forced individual arbitration is to make the process so onerous that no one brings a case and if they do, it's only one with very limited damages…If these arbitration clauses are enforced then employers are going to be looking at potential massive numbers of arbitration, paying the cost of each individual arbitration and litigating over and over and over again similar issues." (Bloomberg Law, U.S. Law Week, March 17, 2021).

Of course, plaintiffs' counsel will also have to litigate the same issues over and over on a piecemeal basis if class action waivers are recognized, and if they seek equitable relief such as replacement of a fiduciary, may have to justify how that can be done. Plan sponsors should also not underestimate the administrative challenges of complying with potentially inconsistent decisions on the same plan issues. IRS requires qualified plans to be operated in a non-discriminatory manner and that provisions be applied consistently to similarly-situated participants.

From a broader policy point of view, permitting mandatory arbitration of ERISA claims would free the courts from spending time on cookie cutter cases with conclusory allegations of breach, many of which are dismissed for failure to state a cause of action. However, mandatory arbitration could also be viewed as restricting fiduciary accountability and participants' ability to achieve the relief contemplated when ERISA was enacted.

Practical Recommendations for Plan Sponsors

Given the many unanswered questions about mandatory arbitration of fiduciary breach claims, some plan sponsors who would prefer arbitration will make a reasoned decision to wait until the law is clarified before proceeding. Others may predict that the Supreme Court will favor mandatory arbitration of ERISA claims based on language strongly favoring arbitration in the Epic Systems and Lamps Plus decisions and want to proceed, particularly if they have been seeking to arbitrate employment claims generally.

Recommended Practices

Plan sponsors seeking the best chance of enforcing mandatory arbitration of ERISA fiduciary breach claims and keeping all issues out of the courts should consider the following steps:

- Provide that an arbitrator will decide whether the disputes are arbitrable.
- Require all employees to sign an arbitration agreement that specifically refers to ERISA fiduciary breach claims and contains a clear class action waiver or put such a provision into a larger employment agreement. Reference to ERISA fiduciary breach claims is important because the Ninth and Second Circuits did not accept that general references to employment disputes covered ERISA fiduciary breach claims. The signature is evidence of participant consent.
- Adopt a plan provision requiring mandatory individual arbitration of all claims and disputes, including ERISA fiduciary breach claims, to satisfy any requirement that the plan must consent to arbitration.
- Notify participants and former employees with vested benefits immediately when the plan provision is adopted. Describe it in the Employee Handbook and include a provision in the Summary Plan Description stating that all fiduciary breach claims must be arbitrated on an individual basis. Revise the model ERISA Rights statement issued by the Department of Labor to qualify the statement that participants can sue in federal court.
- Reference the arbitration clause in any communications regarding a dispute, including any decisions on claims and appeals of claim denials that are filed.
- Mention some consideration provided by employees/participants in these documents.
- Specify a specific venue for the arbitration to control potentially inconsistent decisions. Forum selection clauses have been recognized by the courts in ERISA litigation. See, e.g., the April 1, 2021, 9th Circuit decision in *Becker v. U.S. District Court*, 990 F.3d 731 (9th Cir. 2021).
- Consider requiring a three-judge panel rather than an individual arbitrator to further minimize the chances of a decision that seems to be out of step with general interpretations of ERISA.

What Does the Future Hold?

Given the inconsistency of the lower court decisions on this issue, it seems likely that the Supreme Court will agree to accept a case to decide on the arbitrability of fiduciary breach claims in the future. A majority of the court has favored arbitration of employment disputes and did not require that the parties actually negotiate the provisions from any position of equal power. In Epic Systems, the Supreme Court expressed the view that the National Labor Relations Act and the Federal Arbitration Act should be interpreted so as to give both effect, and the same analysis might be applied to ERISA.

Ruth Bader Ginsburg, who joined the dissenters, is no longer on the court. However, it is never possible to predict with certainty what the Supreme Court will do. The Court could establish parameters for enforceable provisions or simply rule whether mandatory arbitration of fiduciary breach claims is permissible.

New Legislation

Congress could also step in to limit mandatory arbitration of employee disputes by excluding ERISA claims from the scope of the FAA, but the recent decisions narrowly construing whether disputes are "employment-related" suggest that specific reference to ERISA claims will be necessary to do this.

A few bills introduced as a result of Epic Systems and Lamps Plus are not clearly applicable to ERISA. For example, HR 842, the Protecting the Right to Organize Act. which was passed by the House of Representatives on March 9, 2021, would amend [Section 1(a) of the National Labor Relations Act to prohibit certain class action waivers notwithstanding the FAA. HR 963, the Forced Arbitration Injustice Repeal (FAIR) Act, would prohibit predispute arbitration agreements and joint action waivers in "employment disputes", which are defined as disputes "arising out of or related to the work relationship or prospective work relationship…" Another bill, HR 2196, prohibits pre-dispute arbitration agreements of certain claims of service members and veterans.

While some states have enacted laws to prohibit mandatory arbitration of employment discrimination claims, such as Section 7515 of New York's CPLR, courts are not agreed on whether the FAA permits state action in this area. (See, e.g., *Whyte v. WeWork Companies, Inc.*, 2020 BL 216703 (S.D.N.Y. 2020), refusing to recognize Section 7515 because "the FAA does not permit states to determine the arbitrability of individual issues." Any state action regarding arbitrability of ERISA claims, however, would likely be found to be separately preempted by Section 514(a) of ERISA, which provides generally

that ERISA shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan…"

Voluntary Agreements Are Also An Option

Plan sponsors who choose to wait to see how the law develops with respect to mandatory arbitration might consider the option of working out a voluntary arbitration procedure for specific disputes. These could have specific protections, such as requiring arbitration before a particular panel or limited appeal rights.