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Arbitration of ERISA Claims: Yes You Can!

By René E. Thorne and Kenneth C. Weafer

I. INTRODUCTION.

ERISA neither expressly nor impliedly prohibits mandatory arbitration of claims.[1] Numerous courts that have analyzed the purpose of both ERISA and the Federal Arbitration Act (''FAA'') have held that ERISA claims are arbitrable.[2] And while the Supreme Court has not spoken directly to the issue, the Court's pro-arbitration jurisprudence under the FAA[3] – culminating with several decisions approving the inclu-

[1] Department of Labor (''DOL'') regulations provide a limited qualification related to administrative review of health and disability benefit claims, as will be discussed below.

[2] *See, e.g., Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006) (explaining that the Ninth Circuit Court of Appeals had ''expressed skepticism about the arbitrability of ERISA claims . . . but those doubts seem to have been put to rest by the Supreme Court's opinions. . . .''); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (holding ''that Congress did not intend to prohibit arbitration of ERISA claims''); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) (surveying prior courts and ''agree[ing] that Congress did not intend to exempt statutory ERISA claims from the dictates of the Arbitration Act''); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1119 (3d Cir. 1993) (overturning circuit precedent and holding that ''agreements to arbitrate statutory ERISA claims under the FAA may be enforceable.''); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478-79 (8th Cir. 1988) (similar); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014) (recognizing that the Sixth Circuit ''ha[d] previously upheld the validity of mandatory arbitration clauses in ERISA plans'' in *Simon v. Pfizer* Inc., 398 F.3d 765 (6th Cir. 2005)); *Challenger v. Local Union No. 1*, 619 F.2d 645 (7th Cir. 1980) (arbitration clauses upheld in ERISA-based litigation outside of FAA context); *Hornsby v. Macon County Greyhound Park, Inc.*, 2012 U.S. Dist. LEXIS 81552 (M.D. Ala. 2012) (''The court finds these decisions persuasive, and there is no need to repeat the now well-established reasons for holding that ERISA claims may be subject to arbitration. Thus, having carefully examined this body of law and the rationale of each decision, and while neither the Supreme Court nor Eleventh Circuit has explicitly ruled upon the issue of whether ERISA claims are subject to arbitration, this court holds that Congress did not intend to prohibit arbitration for ERISA claims.''); *Hendricks v. UBS Fin. Servs., Inc.*, 546 Fed. Appx. 514 (5th Cir. 2013) (compelling arbitration of ERISA claims). The Eleventh Circuit's decision in *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005) suggests that it would uphold the mandatory arbitration of ERISA claims under the FAA, as that case included ERISA claims, but they were not included in the dispute resolution policy at issue.

[3] *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (Section 2 of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (FAA requires rigorous enforcement of agreements to arbitrate); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (No presumption under FAA against arbitration of federal statutory claims); *see also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Ro-*

René E. Thorne is the Managing Shareholder of the New Orleans office, and Kenneth C. Weafer is a benefits associate in the Albany, New York office. They are both members of the firm's Class Action and Employee Benefits Practice Groups. The authors represent management in all aspects of employment law, including representation of employers, plans, plan fiduciaries, and trustees in employee benefits and fiduciary litigation.

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sion of class action waivers in arbitration agreements[4] – strongly suggests that it would sanction the inclusion of ERISA claims in an arbitration agreement.

Moreover, courts applying the recent Supreme Court decisions involving mandatory arbitration agreements have affirmed the use of class waivers in a variety of federal statutory contexts, including ERISA.[5] As a result, more and more employers are implementing broad arbitration clauses with class action waivers.[6]

The endorsement of arbitration of ERISA claims means that employers may want to consider implementing a mandatory arbitration policy that covers *all* workplace-related causes of action, including ERISA claims. This article does not provide in depth coverage of the advantages and risks of including ERISA claims in an arbitration program, but highlights some of the key issues.[7] Before deciding to implement a mandatory arbitration policy prohibiting class-based litigation of all potential claims (including claims that could be brought under ERISA), employers should consider whether the program is appropriate for their organization and should determine whether the benefits of such program outweigh any potential costs associated with its drafting, corporate rollout, and enforcement.

II. IMPLEMENTING A MANDATORY ARBITRATION POLICY PROHIBITING CLASS-BASED DISPUTE RESOLUTION: SOME PROS AND CONS

Advantages. There are many advantages for employers who adopt a mandatory arbitration program that prohibits class litigation. When deciding whether to implement an ''all claims'' arbitration agreement, perhaps the biggest consideration is the ability to require that any future ERISA *class* claims could be included within the scope of the arbitration agreement. In today's litigious environment, most sizable companies are at risk for class actions, including ERISA class actions. When ERISA fiduciary breach claims are involved, damages are often alleged to be tens or hundreds of millions.

Likewise, the private nature of the proceedings and the confidential negotiation and resolution of arbitration can help minimize a potential public devaluation of the corporate brand. Experienced arbitrators can also be an advantage. When an ERISA claim is brought in federal court, there is a relatively high likelihood that the district judge does not have expertise in ERISA. By contrast, today most large arbitration associations have a roster of experienced ERISA arbitrators.

Other considerations are costs and likelihood of success. For instance, a 2011 Cornell University study found that employers win more often in arbitration than litigation, and that arbitration often results in lower awards for employees.[8] In short, arbitration, with its greater procedural and evidentiary flexibility, *may* provide a speedier, cheaper, more efficient, and more advantageous resolution to disputes.

Risks. Arbitration is not without its drawbacks. Rarely is an arbitration award vacated. The FAA provides for appellate review in very limited circumstances (e.g., fraud, partiality, arbitrator exceeds scope of authority), and those appeals are largely confined to challenges regarding the general fairness of the arbitration process itself (unless, as discussed below, the agreement provides otherwise).

Moreover, the arbitrator's interpretation of the arbitration agreement, even if erroneous, is afforded great deference by federal courts.[9] Mandatory arbitration of benefits claims under ERISA does present unique challenges. For instance, the notice and disclosure process required by ERISA, and the management of workforce perceptions may present employers with complications during the rollout and implementation of the mandatory arbitration program which includes benefits claims.

If an employer does decide to include ERISA claims within its arbitration program, as will be discussed below, there are drafting suggestions and other communi-

driguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

[4] *Stolt-Nielsen S.A. v. AnimalFeeds Corp.*, 559 U.S.662 (2010) (under FAA a party may not be compelled to submit to class arbitration without a contractual basis for concluding that the party agreed to do so); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts state law given the strong federal policy favoring arbitration and enforcement of arbitration agreements); *Oxford Health Care v. Sutter*, 133 S. Ct. 2064 (2013) (arbitrator awards are upheld so long as the arbitrator's determination is based on construction of the arbitration agreement, even if interpretation is erroneous); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (unless there is a contrary congressional command, class action waivers will be upheld even if pursuing such claims would be prohibitively expensive).

[5] *Sutherland v. Ernst & Young, LLP*, 2013 U.S. App. LEXIS 16513 (2d Cir. 2013) (FLSA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013) (Title VII); *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (NLRA); *Luchini v. Carmax*, Inc., 2012 U.S. Dist. LEXIS 102198 (E.D. Cal. 2012) (court dismissed without prejudice plaintiff's collective and representative claims where plaintiff failed to provide authority for a nonwaivable right to bring a class or collective action under FLSA and ERISA). *See also Hornsby v. Macon County Greyhound Park, Inc*., 2012 U.S. Dist. LEXIS 81552 (M.D. Al. 2012) (holding that silence on class in an arbitration agreement meant that Plaintiffs could not proceed as a class).

[6] According to 2015 survey by the law firm Carlton Fields Jorden Burt, since the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* in 2011, ''the use of arbitration clauses to address class actions has continued to rise'' with ''the percentage of companies that address class actions in their arbitration clauses . . . more than doubl[ing] (from 21.4 to 45.8 percent), with most of those companies now using clauses that explicitly preclude class actions.''

[7] For comprehensive treatment of the pros and cons of including ERISA claims in an arbitration program, see the forthcoming article from Jackson Lewis.

[8] *See* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1 (2011).

[9] *Sutter*, 133 S. Ct. at 2071(''The arbitrator's construction [of the agreement] holds, however good, bad, or ugly'').

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cative strategies that can be used to maximize the full benefit and utility of the program, minimize any negative potentialities, and safeguard against challenges to enforcement after the policy has been implemented.

III. SPECIAL CONSIDERATIONS WHEN DRAFTING, IMPLEMENTING, AND ENFORCING A MANDATORY ARBITRATION POLICY THAT INCLUDES CAUSES OF ACTION UNDER ERISA

Clarity, fairness, and transparency are hallmarks of an effectively drafted and implemented mandatory arbitration program. Employers will benefit from keeping these general principles front and center during all phases of the rollout of the program. The incorporation of ERISA claims into the arbitration agreement does require special care and consideration when crafting and implementing the program. Below is a non-exclusive list of some of the more important considerations.

a. Application of General Contract Principles and Other Drafting Considerations. As the Supreme Court has made abundantly clear, it is essential that the arbitration agreement contains the basic attributes and threshold requirements of a valid contract: consideration, mutual assent, and definiteness of terms. To stave off challenges to contract formation, it is critical that assent is evidenced by written acknowledgment that the employee understands and accepts the terms of the agreement. It is also wise to include severability and choice of forum clauses, and to incorporate into the agreement an appellate arbitration procedure to protect against the limited appellate review under the FAA.

b. Defining the Scope of the Agreement and the Powers and Duties of the Arbitrator. Consider specifying in the agreement that the arbitrator, not the court, decides any and all questions of enforceability/arbitrability, with one exception: the class waiver. To take advantage of the Supreme Court's pro-class action waiver jurisprudence, reserve review of any challenge to the class action waiver to the court. In this way, the company has a right of appeal if the district court invalidates the waiver/finds that silence means plaintiffs can proceed as a class.

Similarly, to get maximum value from the mandatory arbitration program, employers must clearly delineate the scope of the agreement by specifying what types of claims will be subject to arbitration. A good rule of thumb: broad provisions are best (e.g., ''all claims of whatever nature arising out of or related to the employee's employment.'')

Be sure to identify the parties that will be subject to and bound by the arbitration agreement. To avoid the *Oxford Health Care v. Sutter* scenario (Justice Scalia: ''[t]he arbitrator's construction holds, however good, bad, or ugly'') where the arbitrator was free to interpret the agreement to allow for class arbitration, explicitly and unequivocally mandate in the agreement that the dispute must be arbitrated on an individualized basis. Additionally, employers will need to assess and evaluate corporate culture when deciding whether the mandatory arbitration program will include all employees or only newly hired employees and/or new plan participants.

Regardless of the arbitrator's working knowledge of ERISA, the agreement nevertheless should limit the scope of the arbitrator's review on a denial of benefits claim to the facts contained in the administrative record, as would be the case in federal court after the exhaustion of administrative remedies. Employers define the scope of the arbitrator's review by including language that the arbitrary and capricious standard applies to claims for wrongful denial of benefits[10] (whether under an ERISA-governed plan or otherwise).[11]

c. Incorporating the Mandatory Arbitration Program into the Plan. Aside from the contractual requirements of any enforceable arbitration agreement, ERISA requires employers and other plan fiduciaries notify and inform participants and beneficiaries about their benefits, rights, and obligations under the benefit plans in which they participate. Thus, unlike the arbitration of either commercial or traditional workplace disputes, where the operative provisions can be contained within the four corners of one controlling document, the implementation and rollout of a mandatory arbitration program that includes ERISA causes of action requires reference in plan documents to ensure a court will find the agreement to arbitrate ERISA causes of action enforceable. The main vehicle for informing participants and beneficiaries of these requisite features under the plan is the summary plan description (the ''SPD''). DOL regulations require certain information to be contained in the SPD, much of which is information to assist participants and beneficiaries recover benefits or enforce or clarify rights under the plan.[12] Therefore, it is critical that there is a uniformity and clarity of intention between and among the arbitration agreement, the plan, and the relevant notice, namely the SPD, provided to plan participants and beneficiaries.

Thus, when drafting a mandatory arbitration program that includes fiduciary breach and other statutory claims under ERISA and as well as claims for benefits,[13] reference to the arbitration program must be included not only in the relevant agreement[14] but also in the plan documents, preferably in the rights and claims procedures sections of the plan and the SPD.

Likewise, the terms of the arbitration agreement should be specifically incorporated by reference into the plan and the SPD, and remain consistent throughout all of the relevant and operative documents. Inconsistencies or ambiguities between and among the documents may render them unenforceable.

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[10] Again, as discussed below, there are special considerations for health and disability claims only.

[11] Reminder to employers and plan sponsors: the plan should unequivocally confer discretion on the plan administrator to interpret the plan and make benefit determinations thereunder, whether or not they have adopted a mandatory arbitration program. Failure to do so may result with the arbitrator requesting not only additional documents that were not part of the administrative record but also the having of a hearing and the calling of witnesses to supplement the record.

[12] *See* 29 C.F.R. § 2520.102-3.

[13] Our reference to benefit claims includes claims under non-ERISA governed benefits plans, such as many short term disability plans. Both types of claims should be subject to mandatory arbitration and the prohibition of class-based litigation.

[14] Arbitration provisions may be included in employment agreements, but they can also come in the form of stand-alone agreements.

If substantive changes are later made to the arbitration agreement/program, such changes may need to be reflected in the plan documents and a summary of material modifications may need to be provided to plan participants informing them of any changes to the program.

To avoid any possible gaps in coverage (i.e., during the time of execution of the agreement and the time the employee becomes eligible to participate in the plans), the arbitration clause should specifically reference that it applies to any claims which may arise out of plans to which the employee may be eligible.

d. ERISA-Governed Benefits Claims and DOL Regulations. Fiduciary breach claims and actions for equitable relief under ERISA §§ 502(a)(2) and (a)(3) respectively, COBRA litigation, and other statutory claims under ERISA, e.g., Section 510 suits to redress discrimination, retaliation, and coercive interference, Section 515 actions for delinquent contributions under § 502(g)(2) and Section 4301 actions for withdrawal liability payments (which is mandatorily arbitrated under § 4221(a)(1) anyway) can be subject to mandatory arbitration. Claims for benefits under ERISA, too, can be arbitrated, but the DOL has adopted regulations that limit the use of mandatory arbitration of claims involving group health and disability plans.[15] To be clear, all benefit claims, ERISA-governed or otherwise, can be arbitrated, but adverse benefit claimants under group health and disability plans cannot be prevented from suing thereafter.[16]

Employers with self-insured health or disability plans should be mindful of these regulations when crafting arbitration agreements and claims procedures under the benefits plan, and may consider carving out such claims from the scope of the agreement. For instance, the relevant arbitration provision could be drafted to draw a distinction between the claims for group health and disability benefits, and arbitration with respect to any other types of benefit-related claims, including those that can be brought under ERISA.

e. Insured Plans. A final note about insured plans is worth mentioning. Employers routinely provide welfare benefits like health, disability, and life insurance by purchasing group insurance coverage. More often than not, benefit claims under such plans are administered by the carrier, not the employer. If the employer is named in a wrongful denial of benefits claim under ERISA Section 502(a)(1)(B) arising out of one of these insured benefits, the employer typically can tender the claim to the insurance carrier as claims administrator of the claims, and remove itself from the litigation. To deal with this issue in an arbitration agreement, the employer can include language in all operative documents excluding claims for benefits which are insured and for which the employer does not serve as claims administrator. Any tag along claims against the employer, like a penalty or breach of fiduciary duty claim, will keep the employer in the dispute, but such claims would still be subject to mandatory arbitration.

IV. CONCLUSION.

These drafting considerations are all designed to maximize the benefit of the program and fend off any challenges to it. However, the culture, business considerations, and plans for each employer are unique. Therefore, we strongly recommend you consult with counsel when deciding whether arbitration of ERISA claims is right for you.

[15] 29 C.F.R. § 2560.503-1(c).
[16] 29 C.F.R. § 2560.503-1(c)(4)(i) and (ii).

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