Employee Benefits Newsletter
December 2023

Services

Employee Benefits and Executive Compensation

Fiduciary Duties and Governance

Qualified Retirement Plans

Taft-Hartley Plans

Health and Welfare Plans

Government Plans

Higher Education

Employee Stock Ownership Programs (ESOPs)

Executive Compensation and Nonqualified Plans

ERISA and Benefits Litigation

College Savings and ABLE Plans

Mandatory Paid and Unpaid Leave

Audits and Investigations

U.S. Supreme Court Declines To Resolve Split Regarding Enforceability of ERISA Plan Arbitration Provisions

The United States Supreme Court recently declined to resolve the growing debate over whether employers can require ERISA class litigation to be conducted through arbitration if the plan document requires arbitration of individual claims. Absent further guidance from the Court, we recommend that plan arbitration clauses be carefully drafted and include backup provisions for resolving disputes in case the arbitration provisions are not enforced.

The Federal Arbitration Act generally provides that mandatory arbitration agreements are enforceable, provided that the would-be litigants can "effectively vindicate" their statutory rights in an arbitral forum. The U.S. Department of Labor also supports the right of ERISA-covered plans to contain individual arbitration agreements. As a result, many health and welfare and retirement plans include arbitration clauses that require claims brought against the plan or its fiduciaries be resolved via arbitration.

In August 2019 the United States Court of Appeals for the Ninth Circuit ruled that an employer could enforce its arbitration provision because it contained a class-action waiver. However, the Second, Third, Sixth, Seventh, and Tenth Circuit Courts of Appeals have all permitted participants to circumvent an arbitration requirement in class-action contexts when the arbitration clause prevents effective vindication of their statutory ERISA rights. In this context, "effective vindication" means that a plaintiff must be allowed to seek *all* available remedies under ERISA, such as removing a fiduciary or receiving statutory damages.

On October 10, 2023, the Court declined to resolve this circuit split for the third time in five years, having previously declined to hear similar cases in February 2019 (involving the University of Southern California's 403(b) plans) and in January 2023 (involving Cintas Corp.'s 401(k) plan). Until the Court resolves the issue, we recommend that ERISA plans with arbitration provisions be revised to restrict *forum and venue* rather than *available remedies*. We also recommend that ERISA plans include provisions that would apply in case arbitration is unavailable or unenforceable.

If you have questions about your plan's alternative dispute resolution options or need assistance reviewing and revising your plan's arbitration and dispute resolution provisions, please reach out to a member of our Employee Benefits and Executive Compensation practice group.