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What High Court Arbitration Ruling Means for Benefits Litigation

By Madison Alder

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- Employers may now require workers to use individual arbitration to settle disputes, Supreme Court said
- Individual benefit claims made on behalf of the plan under ERISA not affected by May 21 High Court decision
- Ninth Circuit could soon decide if arbitration rules apply to claims made by a participant

Employers that offer their workers benefit plans might want to evaluate those plans now that the U.S. Supreme Court ruled that employers can require employees to arbitrate legal claims.

The ruling in *Epic Systems v. Lewis*, which was consolidated with *NLRB v. Murphy Oil USA Inc.* and *Ernst & Young LLP v. Morris*, makes it easier for employers to avoid class and collective action by allowing them to write mandatory arbitration agreements into the terms of employment. The decisions don't specifically address the Employee Retirement Income Security Act because of the way those class action claims operate, attorneys told Bloomberg Law.

Most ERISA class actions are brought under a section of the statute that allows an individual employee to make a claim for plan-wide relief. Courts consistently have required that fiduciary breach claims—the most common class claim—be pursued "on behalf of the plan," which is why most of these cases are brought as class actions rather than as individual claims.

"When it comes to ERISA claims, the Supreme Court decision isn't the final word," Heather M. Mehta, an associate with Greensfelder Hemker & Gale PC, which represents management clients, told Bloomberg Law. "There are still issues to be litigated."

Plan-Wide Relief

The U.S. Court of Appeals for the Ninth Circuit soon may answer the question of whether a worker's arbitration agreement with their employer also applies to litigation brought under ERISA.

The Ninth Circuit heard arguments just last week in a lawsuit by University of Southern California workers who allege USC's retirement savings plan was mismanaged. Unlike a class action, which would be made under Rule 23 of the Federal Rules of Civil Procedure, the claim was made under Section 502(a)(2) of ERISA, which allows an individual employee to file a complaint on behalf of the plan.

The Ninth Circuit will decide whether mandatory arbitration provisions in the USC workers' individual employment agreements bar them from pursuing the case as a class.

If the Ninth Circuit says the mandatory arbitration provisions can't stop the workers from pursuing the case as a class, this could be "discouraging for employers," knowing that merely adding an arbitration agreement to their terms of employment "won't get them out of certain class actions," said **Mehta**, who works in St. Louis.

"A key open item after this decision remains the question of whether a participant class action claim is an 'individual' claim covered by an arbitration agreement or actually a 'plan' activity where the plan is a separate legal entity and the claim isn't covered by an agreement to arbitrate," David Levine, principal at Groom Law Group in Washington, told Bloomberg Law in an email.

The interaction between ERISA and federal arbitration law is an important question for plans that are facing participant lawsuits, Levine said. "We will have to see the DOL's and court's perspective on this interaction as we go forward."

A Ninth Circuit decision in the lawsuit against USC likely would set precedent for two other lawsuits against Franklin Templeton and Charles Schwab that present a similar issue. If appealed, the cases also would go to the Ninth Circuit.

Rewriting the Rules

Hours after the Supreme Court's decision on May 21, labor and employment firm Ogletree Deakins released an online tool for employers looking to create their own arbitration agreements. The firm boasts a five-minute process for getting the contract. The document won't apply to benefits plans.

"The arbitration agreement specifically excludes and does not apply to all claims for benefits under a plan or program that provides its own process for dispute resolution," Ron Chapman, a shareholder in the Dallas office of Ogletree Deakins, told Bloomberg Law in an email.

The employer arbitration agreement wouldn't have an impact on claims made under ERISA because benefit plans have their own form of dispute resolution, Chapman said.

Charles F. Seemann III, employee benefits litigator and a principal with Jackson Lewis PC in New Orleans, told Bloomberg Law employers should make sure their arbitration agreements limit both Rule 23 class actions and claims for plan-wide relief that benefits other participants.

"The provision upheld in *Epic Systems* is a good starting point, but plan sponsors should also include corresponding language directly in the plan documents," Seemann said.

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