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Using Mandatory Arbitration to Avoid ERISA Class Actions

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A CHANGING LEGAL LANDSCAPE

Employee benefit plan litigation increased significantly in 2020 over its previous high level. Many of these lawsuits are class actions in which plaintiffs allege that plan fiduciaries breached their fiduciary responsibilities under the Employee Retirement Income Security Act (''ERISA'') by choosing underperforming and expensive investments and overpaying for services for their 401(k) plans. Plaintiffs typically seek lost profits based on a benchmark for investments they claim a prudent fiduciary would have chosen and equitable relief such as replacement of plan fiduciaries and/or hiring an independent fiduciary to assist in selecting investments. Many of these cases are settled out of court, but recoveries of $50 million and more are not unheard of.

In their search to gain some control over and rein in this litigation, some plan sponsors have turned to provisions such as contractually shortened statutes of limitation, designated venues for suit, and most significantly, mandatory arbitration of ERISA fiduciary breach claims. Mandatory arbitration can be combined with class action waivers which require claims and relief to be pursued only on an individual basis.

Provisions mandating arbitration have the potential to curb the ability of participants to pursue class action litigation and, by requiring plaintiffs' counsel to pursue claims on a participant-by-participant basis, may alter the economics that have made it so profitable for law firms to pursue ERISA fiduciary breach litigation. However, there are legal uncertainties regarding whether and how arbitration may be required of ERISA plan participants. In the absence of U.S. Supreme Court guidance on point, federal courts have struggled with these issues, but no consistent analysis has emerged.

THE STATUTORY FRAMEWORK

The Federal Arbitration Act (FAA),[1] predates ERISA[2] and was enacted to encourage the use of arbitration. It mandates that contractual ambiguities be resolved in favor of arbitration. Despite the fact that the FAA was in effect when ERISA was adopted, ERISA's statutory text and its Conference Report fail to discuss whether ERISA claims are arbitrable.

Section 502 of ERISA sets out a comprehensive scheme for participants and beneficiaries to enforce their rights through ''civil actions.'' Section 502 specifically provides that such suits may be brought in the federal district court where the participant resides, the breach took place, or the plan is administered. Section 502(a)(1) of ERISA authorizes suits to recover benefits owed to the participant and §409, §502(a)(2), and §502(a)(3), of ERISA authorize participants to sue for damages, such as lost profits, resulting from a fiduciary breach as well as for equitable relief such as removing fiduciaries who fail to fulfill their fiduciary responsibilities. It is clear from the text that ERISA contemplates that a participant suit can result in plan-wide relief.

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[1] 9 U.S.C. §1, *et seq.*

[2] ERISA refers to the The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93–406.

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ERISA does not preempt other federal law. This means that ERISA could be overridden by the FAA if the FAA requires enforcement of agreements to arbitrate ERISA claims. However, ERISA §410(a) states that any provision in an agreement or instrument purporting ''to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this Part [meaning Part 4 of Title 1 of ERISA] shall be void as against public policy.'' If arbitrators cannot award all of the types of relief available if an ERISA fiduciary breach claim is brought in federal court, it is possible that this language could be read to make agreements requiring mandatory of ERISA claims invalid and void as against public policy.

UNANSWERED QUESTIONS

Questions raised by the statutory language remain unanswered today, though courts have been grappling with them for many years. Among these questions are: Should ERISA's statutory claims be treated differently than commercial claims under the FAA? Must there be consideration and a voluntary agreement for a waiver of the right to sue? Can participants be required to waive the right to bring a class arbitration, which is similar to a class action? How can plan-wide relief be awarded in individual arbitrations? Should arbitrators be deciding complex ERISA claims and possibly even issues of first impression when there may be no effective right of appeal in arbitration? Is there any room for state action in the ERISA sphere? The impact of §410(a) of ERISA on these arbitration agreements has also been considered.

PRIOR CASE LAW

Even though the U.S. Supreme Court has never ruled on arbitration of ERISA claims, some plan sponsors have noted the lack of a statutory prohibition and attempted to enforce mandatory arbitration of ERISA claims. Many courts were receptive and upheld the ERISA arbitration clauses.[3]

These decisions applied the reasoning in the U.S. Supreme Court's decision in *Shearson/American Express Inc. v. McMahon,*[4] analyzing the Securities Exchange Act of 1934 (the '' '34 Act'').[5] The '34 Act, like ERISA, gave jurisdiction of disputes to federal district courts, and has a provision similar to §410(a) of ERISA. Section 29(a) of the '34 Act provides that any provision binding any person to waive compliance with the Act is void. The Supreme Court determined that statutory claims were arbitrable absent evidence that Congress intended to exclude them from the FAA's reach and that §29(a) of the ''34 Act would not be violated by arbitration.

In the *Sulit* decision, the court rejected the arguments that ERISA was too complex to be interpreted by arbitrators and that the absence of a provision in ERISA allowing a waiver of rights meant that such waivers were not permissible. There was also no ''inherent conflict between arbitration and the statute's underlying purposes.'' [6]*Sulit* also rejected the argument that an arbitration agreement was against public policy under ERISA §410. The *Pritzker* decision determined that arbitration was permissible where statutory rights were involved so long as the litigant could effectively vindicate a statutory cause of action in arbitration.

However, the courts were not unanimous in upholding ERISA arbitrations. The Ninth Circuit in *Amaro v. Continental Can Company,*[7] held that arbitrators lacked the competence to interpret statutes as Congress intended and that ERISA minimum standards for plan equity could not be satisfied in arbitration proceedings.[8]

THE SUPREME COURT REOPENS THE ISSUE

Against this background, the Supreme Court issued two recent decisions, *Epic Systems v. Lewis*,[9] and *Lamps Plus v. Varela*,[10] supporting the right of employers to compel arbitration of employment claims. The Supreme Court applied a contract law analysis. Neither of these decisions dealt with ERISA, but the majority in each was broadly supportive of mandatory arbitration. In one of the cases, the Court ruled that federal labor law (the National Labor Relations Act) did not override the FAA and that the arbitration contract would be unenforceable only if there were traditional equitable factors such as fraud or unconscionability.[11] In the *Lamps Plus* case, the Supreme Court held that ambiguous provisions would not be interpreted as permitting class arbitrations.

Although the Supreme Court looked mostly to contract law principles in interpreting the arbitration

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[3] Among the appellate cases were *Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000*); Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir.1993).

[4] 482 U.S. 220 (1987).

[5] 15 U.S.C. §78a.

[6] *Sulit*, 847 F.2d at 478.

[7] 724 F.2d 747 (1984).

[8] *Amaro*, 724 F.2d at 750-752.

[9] 1385 S. Ct. 1612 (2018).

[10] 1395 S. Ct. 1407 (2019).

[11] Section 2 of the FAA itself recognizes that an artibitration agreement is enforceable ''save upon such grounds as exist in law or equity for the revocation of any contract.''

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agreements, the Supreme Court refused to apply a state contract law construing ambiguous language against the drafter(employer), holding that consent to class action arbitrations would not be inferred in ambiguous situations. Justice Roberts in his majority opinion in *Lamps Plus* also specifically rejected the use of state contract principles such as presumptions to reshape class-wide arbitration procedures without the parties' consent.[12] If fiduciary breach claims are arbitrable, under these general rules employers may require covered claims to be arbitrated on a participant-by-participant basis if their documents are drafted properly.

A vigorous dissent to these decisions declared that the actions upheld by the Supreme Court turned the concept of arbitration on its head, as arbitration was intended to be a dispute resolution procedure negotiated by parties with equal bargaining power rather than something forced on employees. In fact, the Supreme Court upheld arbitration where employees were told that they would be fired if they did not agree to mandatory arbitration.

RECENT FEDERAL COURT DECISIONS MAKE NEW LAW

After the Supreme Court's recent decisions, federal courts have struggled anew with whether mandatory arbitration of ERISA fiduciary breach claims is permissible and to determine the correct way to analyze the issues. Should contract law analysis be applied, or are there special considerations that attach to ERISA claims? Does it matter how the plan sponsor tries to compel arbitration? Are there specific requirements to make an arbitration agreement covering fiduciary breach claims enforceable? The answers may vary from circuit to circuit.

INCONSISTENT INTERPRETATIONS ACROSS THE COUNTRY

In applying their interpretation of *Epic Systems* and *Lamps Plus v. Varela*, lower federal courts have come to conclusions about the arbitrability of ERISA claims that are not just different, but appear sometimes to be inconsistent. They have applied differing standards in reaching decisions about different types of arbitration provisions. Courts have reviewed language in employment agreements, employee handbooks, and plan documents, and are grappling now with whether the special character of ERISA relief, which can be plan-wide, distinguishes ERISA arbitration from the situations reviewed by the Supreme Court.

[12] *Lamps Plus*, 1395 S. Ct. 1407.

WHO DECIDES WHETHER ARBITRATION APPLIES?

This is a threshold issue. In *Lamps Plus*, the Supreme Court seemed to be saying that even this issue could be made the subject of mandatory arbitration. However, the appellate courts reviewing lower court decisions on motions by plan sponsors to compel arbitration did not send these cases back for an arbitrator to decide the issue.

CAN GENERAL EMPLOYMENT AGREEMENT OR HANDBOOK PROVISIONS COVER ERISA CLAIMS?

The first appellate decision issued after the new Supreme Court decisions reviewed language in an employment agreement used by the University of Southern California.[13] The Ninth Circuit Court of Appeals found that the language requiring arbitration of individual claims wasn't broad enough because ERISA claims are raised on behalf of the whole plan. More recently, in *Cooper v. Ruane Cuniff & Goldfarb Inc.*,[14] the Second Circuit Court of Appeals found that employee handbook language requiring arbitration of ''all legal claims arising out of or related to employment'' did not cover ERISA fiduciary claims. The court reasoned that because fiduciary breach claims did not relate to working conditions and could be asserted by parties who had not participated in the plan, including beneficiaries, the plan sponsor and the Department of Labor, they were not employment-related. The Second Circuit seemed skeptical of mandatory arbitration generally, commenting that individual participants might not be adequate plan representatives as it requires.

It should be noted that the Supreme Court in an earlier decision, *LaRue v. DeWolff, Boberg & Associates, Inc.*,[15] determined that plan participants can sue for damages specific to their individual accounts under §502 of ERISA and need not seek plan-wide relief to have a viable ERISA claim. Therefore, the Supreme Court might not agree with the Second Circuit that arbitration plaintiffs must be able to adequately represent the plan.

MUST THERE BE CONSIDERATION?

The Supreme Court decisions do not discuss specific consideration. However, in *Hensiek v. Board of*

[13] *Munro v. University of Southern California*, 876 F.3d 1088 (9th Cir. 2018).

[14] 990 F.3d 173, 175 (2d Cir. 2021).

[15] 552 U.S. 248 (2008).

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Directors of Casino Queen Holding Co.,[16] the court determined that a plan amendment requiring arbitration was invalid under Illinois contract law because it lacked consideration.

Of course, the benefits under the ERISA plan could be considered consideration for this purpose. This is easier to see if a new participant is joining the plan. A participant already in the plan and accruing benefits may not be viewed a receiving anything new when the arbitration clause is adopted.

WHO MUST CONSENT TO MANDATORY ARBITRATION?

Justice Gorsuch in *Epic Systems* described arbitration as an agreement between the employer and the employee. However, there need not be actual negotiation; in fact, the Court upheld a program in which participants could be fired if they failed to sign the arbitration agreement. Lower courts have nevertheless examined whether more traditional consent is required.

In its *USC* decision, the Ninth Circuit found that ERISA fiduciary breach claims were claims of the plan, and could not be arbitrated because the plan had not consented to arbitration. After that decision, the Ninth Circuit was presented with a case, *Dorman v. Charles Schwab*,[17] in which the plan document contained a mandatory arbitration clause. In that decision, the court upheld the arbitration clause because it determined that the plan had consented to arbitration. The *Dorman* court stated that the participants also consented to the arbitration clause when they participated in the plan.

By equating participation in the plan with consent to arbitration, the court failed to take into account that once a participant has earned and vested in benefits under a tax qualified 401(k) or pension plan, the IRS does not permit participants to waive those benefits. It is difficult to see how consent could be withheld under IRS rules if the plan has nonelective benefits or frozen benefits or with respect to benefits earned before the amendment was adopted. Issues of consent and notice are also raised in a pending appeal before the Seventh Circuit of the decision in *Smith v. Greatbanc Trust Company and Bd. of Dirs. of Triad Manufacturing, Inc.*,[18] where the court will consider whether a plan arbitration clause can be enforced against a participant who was not employed or actively participating in the plan when the amendment was adopted.

[16] No. 3:20-CV-377-DWD, 2021 BL 32519, (S.D. Ill. Jan. 25, 2021).

[17] 934 F.3d 1107 (9th Cir. 2019).

[18] 2020 BL 319742 (N.D. Ill. Aug. 21, /2020).

Is notice a prerequisite to consent? Both the Second Circuit in *Cooper* and the district court in*Smith* noted that the summary plan description booklet-the official summary of the plan required by ERISA-that was provided to participants didn't mention arbitration. Those SPDs just incorporated standard rights language drafted by the Department of Labor referring to the right to sue.

CAN AN ARBITRATOR AWARD PLAN-WIDE RELIEF?

As mentioned above, the Supreme Court in *La Rue* ruled that ERISA permits participants to sue for relief related to their individual accounts. It is unclear how this fits into the ERISA analysis when participants subject to arbitration seek plan-wide relief.

Whether arbitrators can award plan-wide relief was a focus of oral argument in the Seventh Circuit appeal of the *Smith* decision. The district court had declined to enforce a plan arbitration clause containing the following broad language:[19]

> Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deem proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any [Participant] other than the Claimant and is not binding on the Plan Administrator or Trustee with respect to any [Participant] other than the Claimant.

This broad language squarely raises the issue whether the plan-wide relief contemplated under ERISA can be denied, and, if not, how it can actually be awarded in individual arbitrations. It is one thing to pro-rate recovered profits, which is mathematical. Designing individual equitable relief for one claimant can be more complicated. For example, how do you remove a breaching trustee, one of the remedies clearly available under ERISA, with respect to only one account?

The Seventh Circuit's decision on this issue is eagerly awaited.

CAN ARBITRATORS INTERPRET A COMPLICATED STATUTE?

The Second Circuit worried that arbitration could undercut the public policy of imposing personal liabil-

[19] *Smith,* 2020 BL 319742, 2-3.

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ity on breaching fiduciaries under ERISA §409, but no recent decision has been based solely on the ground that ERISA is too complex to be interpreted by arbitrators. This may reflect an understanding of the increasing sophistication of arbitrators and arbitration panels, or the absence of any supporting language in the Supreme Court decisions.

TO ARBITRATE OR NOT?

The unanswered questions and inconsistency among the recent cases present challenges for any plan sponsor trying to require mandatory arbitration of fiduciary breach claims, but it is important to understand that arbitration is not the clearly superior choice. It has drawbacks as well as benefits. However, if a plan sponsor makes a decision to proceed now after weighing the issues below, some recommended practices can be distilled from the new decisions to increase the chances that mandatory arbitration will be upheld.

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 judges, including 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 multi-employer plan withdrawal liability issues, may lack the specific expertise necessary 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:[20]

> 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.

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 plaintiffs seek equitable relief such as replacement of a fiduciary, plaintiffs' counsel 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.

WHAT ARE THE POLICY CONSIDERATIONS?

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. Those that are not dismissed have been taking up an inordinate amount of court and defendants' time in determining questions such as whether plaintiffs have selected the proper benchmark against which to measure damages. It was interesting to note that in recently filed lawsuits some plaintiffs argued that Fidelity Freedom Funds (Fidelity's target date family) were an imprudent investment, while another complaint claimed that the fiduciaries were imprudent because they did not invest in the same Fidelity Freedom Funds. This illustrates how plaintiff's counsel may select a benchmark or alternative investment simply because it differs from the plan's current choice. This type of gamesmanship by plaintiffs' counsel causes a drain on the judicial system but often just ultimately leads to an expensive settlement to make the lawsuit go away. Mandatory arbitration of fiduciary breach claims may also allow plan fiduciaries to avoid the drain on time and company resources involved when they are defendants in any class action litigation, even if they ultimately win.

Court awards and settlements have led to troubling increases in fiduciary liability insurance premiums.[21] It is important that competent and responsible people

[20] Wheeler, *Forced Arbitration Fight Gets Boost From Retirement Plan Ruling*, Bloomberg Law (Mar. 17, 2021).

[21] *See Fiduciary Liability Premiums Are Soaring-What Are Plan Sponsors to Do?,* Insights @cohenbuckmann.com (Oct. 25,

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serve as their company plan's internal fiduciaries, and the inability to afford adequate liability coverage may deter good candidates from agreeing to serve on plan committees.

Equally strong policy arguments can be made against using mandatory arbitration. Fiduciary breaches do occur and it is important to the retirement security of participants that participants injured by the breach be made whole. ERISA was adopted after extensive deliberation by Congress and has a carefully structured remedies section in Part 5 of Title 1. ERISA's fiduciary rules are based upon the common law of trusts, where beneficiaries had long been permitted to sue trustees for breach of fiduciary duty. If the standards adopted in the Supreme Court's recent employment decisions saying that mandatory arbitration could be made a condition of employment were extended to ERISA claims, the result be viewed as restricting fiduciary accountability and participants' ability to achieve the relief contemplated when ERISA was enacted.

PRACTICAL RECOMMENDATIONS FOR PLAN SPONSORS

Is Now the Right Time to Proceed?

Given the many unanswered questions about mandatory arbitration of fiduciary breach claims, and the significant policy considerations involved, 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.[22]
- Consider requiring a three arbitrator 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?

Will the Supreme Court Step In?

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

2020) (citing a report in Investment News).

[22] *See, e.g.,* the April 1, 2021 decision by the Ninth Circuit Court of Appeals in *Becker v. U.S. District Court*, 990 F.3d 731 (9th Cir. 2021).

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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 in *Epic Systems* and *Lamps Plus*, is no longer on the court. However, it is never possible to predict with certainty what the Supreme Court will do. The Supreme 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, H.R. 842, the Protecting the Right to Organize Act, which was passed by the House of Representatives on March 9, 2021, would amend §1(a) of the National Labor Relations Act to prohibit certain class action waivers notwithstanding the FAA. H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act, would prohibit pre-dispute 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, H.R. 2196, would prohibit 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 §7515 of New York's CPLR, courts are not in agreement on whether the FAA permits state action in this area.[23] Any state action regarding arbitrability of ERISA claims, however, could also be found to be separately preempted by §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.

[23] *See, e.g., Whyte v. WeWork Companies, Inc.,* No. 20-cv-1800 (CM), 2020 BL 216703 (S.D.N.Y. 2020) (refusing to recognize NY CPLR §7515 because ''the FAA does not permit states to determine the arbitrability of individual issues'').

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