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Insights

Is It Time to Amend Your Plan Documents for Class Action Waiver and/or Mandatory Arbitration Clauses?

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Is it time you consider amending your plan document to provide a waiver of class actions and mandatory arbitration? We first visited this issue one year ago after a 2019 federal court decision approved use of class action waiver and mandatory arbitration provisions as a means to reduce potential exposure to fiduciary breach and related claim litigation. The law has evolved since that time, and thus we revisit the issue.

In short, a no class action provision requires participants to litigate fiduciary breach claims on an individual basis, and generally limits damage claims to just the plaintiff-participants' individual accounts or claims. Mandatory arbitration clauses are exactly that, -- prohibit participants from filing lawsuits in court, and rather require arbitration, such as with the AAA. Most agreements couple these provisions together, but it is not necessary. A plan can provide for one or the other, or both. Such provisions can be added to many types of plans, including ESOPs and 401(k) plans.

Under current law there is now little disagreement that a plan can enforce class action waiver and mandatory arbitration provisions if written into the plan from its inception. However, much of the litigation in 2020 instead focused on whether these provisions were enforceable following a plan amendment. Generally speaking, to enforce this plan amendment it is necessary to show that the participant was aware of and showed consent to the amended provision. For instance, did the participant have notice that the plan was amended, and did the participant continue employment after the plan was amended, so that the participant manifested agreement by continuing his or employment? The courts have recently allowed or disallowed enforcement of class action waivers or mandatory arbitration provisions in the following scenarios:

- Arbitration clause added to plan after participant left employment and cashed out of plan. (No).
- Arbitration clause added to the plan after participant left employment, but participant remained in plan. (No).
- Arbitration clause added to the plan when participant was a current employee, but no notice of the plan amendment was provided to employee. (Pending and thus undecided).
- Arbitration clause added to plan when participant was a current employee and participant had notice of it and continued employment. (Yes).

These types of cases continue to work their way through the courts, and courts may further limit or expand enforceability of these provisions in the future.

ERISA generally allows an employer to amend a plan at any time. Plaintiff's counsel has objected to class action waivers or mandatory arbitration, arguing that ERISA prohibits such waivers, but with only limited success. As a result, under the concept "you get what you ask for," some plaintiffs' counsel have filed mass individual arbitration demands against employers, literally hundreds of demands, flooding am employer with mandatory arbitration of hundreds of claims given the mandatory arbitration provision.

The pros and cons to arbitration are well recognized, - - no appeal, conflicting decisions, questionable adherence to governing law, etc. The pros and cons to a class action waiver are more obvious, - - and in some instances an employer may actually want a class action determination to prohibit similar repetitive claims. Yet the benefits of class action waiver and arbitration provisions are many, and thus plans should consider amendments along these lines. We are happy to discuss the pros and cons of this approach for your plan.

Please contact any member of our practice group for more information about this topic.