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Employee Benefits & Executive Compensation Tips and Traps

Managing Litigation Risk Under ERISA Plans

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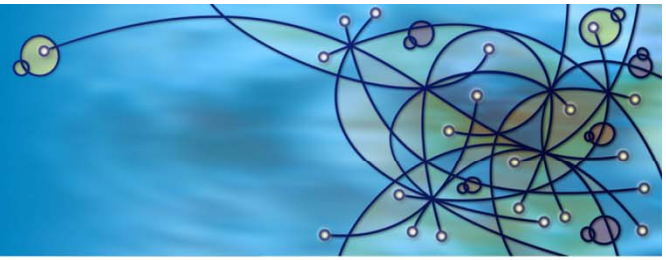
Rebecca C. Davenport
+1 312 701 8118
rdavenport@mayerbrown.com

Archis A. Parasharami
+1 202 263 3328
aparasharami@mayerbrown.com

Tools for Mitigating Litigation Risk in ERISA Plans – Agenda



- Fair Dispute Resolution Through Arbitration
- Plan Provisions that Limit Time for Filing Claim/Suit

Agreements to arbitrate on an individual basis

Why arbitration?

- Advantages of arbitration over litigation
  - Low-cost access to a neutral decision maker
  - Flexibility and customized dispute resolution rules
  - Traditionally takes place on an individual basis instead of by class actions
- The Federal Arbitration Act
  - Section 2: arbitration agreements are "valid, irrevocable, and enforceable," except for generally applicable contract defenses
  - *AT&T Mobility v. Concepcion* (2011)
  - *American Express v. Italian Colors* (2013)

Waiver of class procedures

Arbitration on an individual basis

- Most arbitration agreements waive class procedures
  - Arbitration must take place on an individual basis
  - Supreme Court has called it "bilateral" (*i.e.*, one-on-one)
  - Parties waive right to proceed as a class representative or member

U.S. Supreme Court upholds individual arbitration

AT&T Mobility LLC v. Concepcion

- California Supreme Court had declared that waivers of class arbitration and class litigation were "unconscionable" as a matter of state law
- U.S. Supreme Court holds (5-4) that Federal Arbitration Act preempts state law.
- "Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."
- "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."
- Because of the special features of the AT&T arbitration agreement, "the District Court concluded that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action."

U.S. Supreme Court upholds individual arbitration

American Express Co. v. Italian Colors Restaurant

- Plaintiffs had argued that high cost of expert testimony allegedly needed to prove their antitrust claims far outstripped value of claims and therefore that they could not "effectively vindicate" their "federal statutory rights."
- By a 5-3 vote, Court—applying *Concepcion*—rejects argument that arbitration agreement is unenforceable when cost of proving claim exceeds potential recovery
- Concludes that "effective vindication" doctrine is limited to two situations.
  - (1) when "a provision in an arbitration agreement forbid[s] the assertion of certain [federal] statutory rights"
  - (2) "perhaps" when "filing and administrative fees attached to arbitration … are so high as to make access to the forum impracticable"

ERISA claims are arbitrable

- Federal courts have repeatedly held that ERISA claims are subject to arbitration like virtually all other federal statutory claims (*e.g.*, antitrust, securities, RICO).
  - *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir. 1991): "A presumption that arbitration is an inadequate forum in which to resolve disputes based on complex federal statutes is untenable in light of recent Supreme Court decisions"
  - *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993): "statutory ERISA claims are subject to compulsory arbitration under the FAA and in accordance with the terms of a valid arbitration agreement"
  - *Anulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988): "no congressional intent to single out ERISA claims for exemption from the general federal policy favoring rigorous enforcement of agreements to arbitrate"
- *CompuCredit Corp. v. Greenwood* (2012) (Credit Repair Orgs. Act)

Implementing arbitration agreements in ERISA plans

- Summary Plan Description (SPD)
  - Provide notice of arbitration clause and (at minimum) its key provisions in the SPD
  - Include critically important provisions—and consider including entire clause—in light of principle that SPD offer clear disclosures to employees
- Plan document
  - Include full language of arbitration agreement
  - Ensure that employees manifest assent to plan terms; insulate contract from challenges for lack of contract formation

Implementing arbitration agreement in ERISA context

- Scope of agreement must include ERISA claims
  - Under FAA, doubts about the scope of an arbitration agreement must be resolved in favor of arbitration
  - But easier to avoid doubt by covering "all claims" (and/or specifying that ERISA claims are covered)
    - *Green v. Zachary Industrial, Inc.*, 2014 WL 1232413 (W.D. Va. Mar. 25, 2014) (broad clause includes ERISA claims)
  - Courts have refused to compel arbitration when they conclude that ERISA claims fall outside the scope
    - *Simon v. Pfizer, Inc.*, 398 F.3d 765 (6th Cir. 2005)
- Consider federal regulations relating to "voluntary" and "mandatory" arbitration in the context of group health plans (see 29 C.F.R. § 2560.503-1).

Enforcing individual arbitration in ERISA context

Hendricks v. UBS Fin. Servs., 546 Fed. Appx. 514 (5th Cir. 2013)

- Court examined arbitration provisions in two different plan documents offered to participants; one had a class waiver, the other did not
- Court rejected contentions that the document containing a class waiver was only a summary brochure, or that the two documents improperly conflicted; "both plans can coexist by providing for arbitration based on different scenarios"
- Court required arbitration, ***but*** applicability of class waiver—and whether it complied with Financial Industry Regulatory Authority rules on class waivers—was for the arbitrator to decide
- Drafting lessons:
  - Refer to class waiver in all plan documents, including SPD
  - Ensure that courts rather than arbitrators decide enforceability questions

Courts generally upholding class waivers post-*Concepcion*

- Decisions apply *Concepcion* to require individual arbitration in lieu of ERISA class actions
  - *Hornsby v. Macon Cnty. Greyhound Pk.*, 2012 WL 2135470 (M.D. Ala. June 13, 2012) (rejecting argument that "it would be more efficient" to litigate ERISA claims as a class action)
  - *Tenet Health System Pennsylvania, Inc. v. Rooney*, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012) (arbitrator acted within her authority in deciding that an arbitration agreement did not permit arbitration to proceed on a classwide basis)

Fending off challenges to arbitration

- Formation
  - Plaintiffs' lawyers challenge arbitration agreements, arguing: lack of formation, lack of assent, lack of notice, or improper change of terms
    - Ensure evidence exists that employee received terms of summary and plan documents, such as with a signed letter of acknowledgment
    - Ensure this assent occurs each time there is a change in terms
    - Provide conspicuous notice of arbitration agreement and material terms
- Employee-friendly provisions
  - Protect arbitration clauses from attack by making arbitration available at low or no cost to claimants and (at minimum) making same individualized remedies available to employees as they could obtain in court

Claim Deadlines and Contractual Statutes of Limitation

Overview

- ERISA plans may include provisions that reasonably limit the time during which a claim for benefits may be filed with the plan and/or in court
- For purposes of this presentation:
  - "Initial claim deadline" – deadline for filing an initial claim for benefits under the plan
  - "Contractual limitations period" – deadline for filing suit
- Why include these provisions?
  - Reduce stale claims
  - Greater uniformity/consistency across jurisdictions
  - Mitigate litigation risk

Initial Claim Deadline

- Internal claims and appeal process
  - ERISA plans must establish and maintain reasonable claims procedures
  - What is reasonable?
    - Section 2560.503-1 of Department of Labor regulations
    - Regulations specify deadlines that apply during claims process, but do not address when initial claim must be filed
- Good practice to include deadline for filing claims in plan terms
  - Deadline must be reasonable and communicated to participants
  - More common in certain types of plans (e.g., welfare plans)

ERISA Benefit Claims in Court

- Participant must exhaust administrative remedies before filing a lawsuit in court
- No ERISA statute of limitations for benefit claims
  - Courts generally look to most analogous state law statute of limitations (often, statute of limitation that applies to breach of contract claims) for duration.
- When does limitations period begin to run?
  - Determined under federal common law.
  - If not specified, under general rule period will start to run when claim accrues, which may be when final decision is rendered under internal claims and appeals procedures or when participant has reason to know that claim has been denied (i.e., clear repudiation), depending on jurisdiction (*see, e.g., Dix v. Total Petrochemicals USA, Inc. Pension Plan*, 540 F. App'x 130 (3d Cir. 2013))

Contractual Limitations Periods

- Courts will generally uphold a reasonable limitation for filing suit that forms a part of an ERISA plan as long as the period is not contrary to another controlling statute and has been communicated to participants.
- Supreme Court recently ruled that plan may specify when period begins to run, which may be before cause of action accrues (*Heimeshoff v. Hartford Life & Acc. Ins. Co.,* 134 S. Ct. 604 (2013))

Plan Deadlines – Additional Cases

- Additional cases dealing with contractual limitations periods
  - *Engleson v. Unum Life Ins. Co. of Am.*, 723 F.3d 611 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1024 (2014) (concluding that ERISA claims procedures do not require deadline for filing suit to be included in notification of denial)
  - *Freeman v. Am. Airlines, Inc. Long Term Disability Plan*, 2014 U.S. Dist. LEXIS 22131 (C.D. Cal. Feb. 20, 2014) (finding no separate duty to inform participant of contractual statute of limitations in appeal denial letter when period was included in plan document and Summary Plan Description)

Plan Deadlines – Additional Cases

- Additional cases dealing with contractual limitations periods
  - *Wilson v. Standard Ins. Co.*, 2014 U.S. Dist. LEXIS 12111 (N.D. Ala. Jan. 31, 2014) (upholding disability plan's requirement to file suit within three years of submission of proof of loss (or when such proof is due) and finding no duty to notify of deadline in appeal denial)
  - *Munro-Kienstra v. Carpenters' Health & Welfare Trust Fund of St. Louis*, 2014 WL 562557 (E.D. Mo. Feb. 13, 2014) (upholding multiemployer welfare plan's requirement that suit be filed within two years of adverse benefit determination but stating that ERISA regulations require notification of deadline for filing suit in denial letter)

Plan Deadlines – Additional Cases

- Additional cases dealing with contractual limitations periods
  - *Barriero v. N.J. BAC Health Fund*, 2013 WL 6843478 (D.N.J. Dec. 27, 2013) (unpublished) (upholding requirement that suit be filed within three years after the end of the year in which medical services are provided, even though participant had only nine months to file suit after final determination on claim was rendered)
  - *Claeys v. Aetna Life Ins. Co.,* 548 F. App'x 344 (6th Cir. 2013) (mem.) (upholding health plan's requirement that suit be filed within six months from adverse benefit determination or, if earlier, three years from date service or treatment was provided/claim arose)

Plan Deadlines – Additional Cases

- Additional cases dealing with contractual limitations periods
  - *Upadhyay v. Aetna Life Ins. Co.*, 2014 U.S. Dist LEXIS 5982 (N.D. Cal. Jan. 16, 2014), *motion for reconsideration denied* (2014 U.S. Dist. LEXIS 27675 (Mar. 3, 2014) (upholding LTD plan's requirement that suit be filed within three years of claim filing deadline, which was no later than 90 days after end of elimination period (first 90 days of disability)); *see also Tuminello v. Aetna Life Ins. Co.*, 2014 U.S. Dist. LEXIS 20964 (S.D.N.Y. Feb. 14, 2014)

Thank You

Rebecca C. Davenport
Chicago
+1 312 701 8118
rdavenport@mayerbrown.com

Archis A. Parasharami
Washington, DC
+1 202 263 3328
aparasharami@mayerbrown.com

Maureen J. Gorman
New York
+1 212 506 2679
mgorman@mayerbrown.com