6th Circuit finds participants don't have to arbitrate excessive fee claims

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In this article

A defined contribution (DC) plan sponsor can't require participants to resolve their ERISA excessive fee claims through binding arbitration, despite arbitration provisions in the participants' employment agreements, the 6th US Circuit Court of Appeals recently ruled (*Hawkins v. Cintas Corp.*, No. 21-3156 (6th Cir. April 27, 2022)). The court found that the participants brought these fiduciary breach claims not as individuals but as representatives of the plan, which didn't include an arbitration provision and hadn't otherwise agreed to arbitrate. Plan sponsors considering arbitration to manage their ERISA litigation risks may consider reviewing plan terms with legal counsel.

Representational nature of excessive fee claims

Participants in this case — one of a spate of similar lawsuits against 401(k) and 403(b) plan sponsors — alleged that plan fiduciaries breached their ERISA duties by permitting excessive recordkeeping fees and not offering lower-cost index funds in the DC plan's investment lineup. In its ruling, the 6th Circuit said such claims belong to the plan as whole rather than individual participants, so participants' employment agreements can't subject these claims to arbitration. The court rejected the plan sponsor's argument that participants sought individual relief for their own accounts, saying "the fact that the individual [participants] will indirectly benefit from a remedy accruing to the [p]lan as a whole does not render the claims individualized."

Plan didn't consent to arbitration

The court reasoned that even if the participants' excessive fee claims were covered by their employment agreements — which included specific language referencing ERISA rights and claims — these claims belonged to the plan, so arbitration couldn't proceed without the plan's consent. The court said the plan sponsor hadn't identified any legal authority establishing that a participant "can unilaterally bind an

ERISA plan to arbitration in the absence of an arbitration provision in the plan documents or some other manifestation of the plan's consent." The court also found that the plan sponsor's decision to seek arbitration in this case didn't suffice to provide that consent.

Considerations for plan sponsors

While the court said participants in this case didn't have to arbitrate, the ruling acknowledged many other federal appeals courts have determined that ERISA claims might be subject to arbitration, at least in theory. While noting the sponsor could have amended the plan to include an arbitration provision, the court concluded that it didn't need to decide whether such an amendment would require arbitration of these types of claims. However, other federal courts recently have found that plan sponsors can require binding arbitration of excessive fee claims by amending their plans to add arbitration provisions (*Holmes v. Baptist Health S. FL, Inc.*, No. 1:21-cv-22986 (S.D. FL Jan. 20, 2022)).

The court also distinguished the fiduciary breach claims in this case from individual benefit claims under a different ERISA remedial provision. Under that provision, a participant can sue to recover benefits, enforce rights or clarify rights to future benefits under the plan's terms. The ruling implies that because those more individualized ERISA benefit claims aren't brought on behalf of the plan as a whole, they might be subject to arbitration under the terms of a participant's employment agreement.

The potential advantages of resolving ERISA claims through arbitration — including lower costs, smaller awards and speedier resolution — may appeal to many plan sponsors. But unlike court proceedings, individual arbitration sets no binding precedent for similar claims by other participants. This could mean sponsors might have to arbitrate the same claims multiple times, with potentially different outcomes. As a result, sponsors may prefer obtaining a binding judicial opinion for certain claims. Plan sponsors considering adding mandatory arbitration provisions should consult with legal counsel to better understand the potential advantages and disadvantages.

Bill would hinder arbitration of ERISA claims

House Democrats are advancing legislation that would effectively prohibit plan sponsors from requiring arbitration of ERISA claims. Under the Employee and Retiree Access to Justice Act of 2022 (HR 7740), ERISA claims couldn't be subject to predispute arbitration provisions or class action waivers, whether contained in plan documents or employment agreements. This would mean that sponsors couldn't compel participants to agree to arbitrate claims that may arise in the future. The bill would allow post-dispute arbitration and class action waivers, but only if plan sponsors comply with stringent conditions to ensure that participants voluntarily agree and haven't been coerced (e.g., plan participation or benefit payments couldn't be conditioned on a participant's agreement to arbitrate). On May 18, the House Education and Labor Committee incorporated the bill into a larger measure (HR 7780) and cleared it in a party-line vote. While the House could pass the measure this year, the bill faces a much steeper climb in Senate.

Related resources

Non-Mercer resources

- HR 7740, the Employee and Retiree Access to Justice Act of 2022 (Congress, May 12, 2022)
- *Hawkins v. Cintas Corp.*, No. 21-3156 (6th Cir. April 27, 2022)
- *Holmes v. Baptist Health S. FL*, No. 1:21-cv-22986 (S.D. FL Jan. 20, 2022)

Mercer Law & Policy resources

- 2022 legislative, regulatory and judicial outlook for retirement plans (March 15, 2022)
- 9th Circuit OKs arbitration for ERISA fiduciary breach cases (Sept. 10, 2019)

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