Retirement Bill Eyeing ERISA Arbitration Ban Stirs Strong Reaction

The largest U.S. business lobbyist opposes bill banning discretionary clauses.

Reported by NOAH ZUSS

The largest lobbyist in the U.S. is opposed to a bill introduced in Congress that amends the Employee Retirement Income Security Act.

The bill, introduced by Representative Mark DeSaulnier, D-California, and Senator Tina Smith, D-Minnesota, proposes prohibiting arbitration for ERISA claims and banning discretionary clauses. In a comment letter, the U.S. Chamber of Commerce argues that this would limit recovery amounts, increase the costs of claims for benefits and increase the time for courts to resolve claims for benefits.

The Chamber of Commerce opposes both prongs of the bill: barring participants from bringing class action claims by plan terms and disallowing plan administrators' application of discretionary clauses. Chantel Sheaks, vice president of retirement policy at the Chamber, says that the lobbyists are concerned the bill would harm employer-sponsored benefit programs, including those providing retirement and health benefits.

Plan sponsors seek to mitigate litigation risk and manage exposure to claims with defensive provisions and discretionary clauses that grant the plan administrator binding authority to interpret claims for relief, make plan determinations and provide deferential review for legal challenges.

"Giving both plans and individuals the choice of whether to arbitrate or go to litigation is very important," Sheaks says. "We really think that it's not good public policy just to have a complete ban on arbitration in ERISA cases."

The Chamber also opposes altering deference to plan sponsors. So-called *Firestone* deference allows plan sponsors interpretation authority for deference in litigation challenging plan terms, the Supreme Court ruled in *Firestone Tire & Rubber Co. v. Bruch*. The deference standard is "the core" of the ERISA claim-for-benefits standard and framework, Sheaks says.

Disallowing deference would break the current system because "without it, everything falls apart—for both sides, not just for plans but also for participants," she says.

The entire administrative and claims procedure would be altered, Sheaks says.

"The people who are pushing it really didn't realize the effect it could have on the current system that we have—the claims procedures requiring individuals to go through the [process]. It is a check and balance on the administrator—instead of just having people [who] have claims denied go straight to court," she says.

While the Chamber is opposed to the entire bill, Paragraph E is the "most problematic," Sheaks adds.

That paragraph states that "no covered provision related to a plan other than a multiemployer plan shall be valid or enforceable that purports to confer discretionary authority to any person with respect to benefit determinations or interpretation of plan language, or to provide a standard of review of such determinations or interpretation by a reviewing court in an action brought under this section that would require anything other than de novo review of such determinations or interpretation."

Removing these covered provisions could harm plans and participants and overburden the court system, Sheaks says.

Prompting more claims to be heard in court "can get very expensive very quickly, but also take a lot more time," Sheaks explains.

Arbitrations are resolved, on average, in 659 days compared to 715 days for litigation, according to the Chamber's comment letter. Sheaks adds that March research cited by the Chamber, from economic consultant NDP Analytics, found that arbitration is often preferable for participant settlement amounts.

"When you look at the average recovery [in courts] per participant it's actually not that high," she says.

On average, employees won more money through arbitration—around $444,000—than in court, where they won about $408,000, according to the research. Sheaks expects that, if the bill were passed, for "any ERISA test case, instead of going through the claims procedures that we currently have—if no deference is given—then there's pretty much no reason to go through the claims procedures," Sheaks says.

Under existing law, the plan administrator is allowed to interpret the plan, providing a higher bar—the arbitrary and capricious standard—for courts to overturn a plan sponsor's or plan administrator's determination for benefits eligibility. An arbitrary and capricious standard of review provides that the plan's decision only be overturned by the court if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law," according to the Wagner Law Group ERISA and Employee Benefits Practice.

"That would have precluded plans from giving the plan administrator the deference necessary to get the arbitrary and capricious standard of review in court under *Firestone*, so it effectively was eliminating *Firestone* in the court," Sheaks says.

Tags: arbitration agreements, Employee Retirement Income Security Act, ERISA, retirement plan legislation, workplace benefits

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